No. 89-1799-CFX
Status: GRANTED

Title: Jeffrey M. Masson, Petitioner
v.
New Yorker Magazine, Inc., Alfred A. Knopf, Inc. and Janet Malcolm

Docketed:
May 16, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Morgan Jr.,Charles O.

Counsel for respondent: Olson,Karl

NOTE: See mail. label dockt. dt.

Entry	Date	Note	Proceedings and Orders
1	May 16 1990	G	Petition for writ of certiorari filed.
3	May 24 1990		Order extending time to file response to petition until July 18, 1990.
4	Jul 18 1990	G	Motion of Journalists and Academics Concerned About Media Integrity for leave to file a brief as amicus curiae filed.
5	Jul 18 1990		Brief of respondents New Yorker Mag., Inc., et al. in opposition filed.
6	Jul 18 1990	G	Motion of Mountain States Legal Foundation for leave to file a brief as amicus curiae filed.
7	Jul 25 1990		DISTRIBUTED. September 24, 1990
8	Aug 16 1990	X	Supplemental brief of respondents New Yorker Magazine, et al. filed.
9	Sep 10 1990	X	Reply brief of petitioner Masson filed.
10	Oct 1 1990		Motion of Journalists and Academics Concerned About Media Integrity for leave to file a brief as amicus curiae GRANTED.
11	Oct 1 1990		Motion of Mountain States Legal Foundation for leave to file a brief as amicus curiae GRANTED.
12	Oct 1 1990		Petition GRANTED.
			**********
14	Nov 15 1990		Brief amicus curiae of Certain Journalists and Academics filed.
15	Nov 15 1990		Brief of petitioner filed.
16	Nov 15 1990		Joint appendix filed.
17	Nov 15 1990		Brief amicus curiae of Mountain States Legal Foundation filed.
13	Nov 16 1990		Lodging received. (10 copies).
18	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 14, 1991. (4TH CASE)
19	Nov 28 1990		CIRCULATED.
20	Nov 29 1990		Record filed.
		*	Certified copy of original record and C. A. Proceedings,2 boxes, received.
21	Dec 17 1990	X	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
22	Dec 17 1990	X	Brief amici curiae of Home Box Office, Inc., et al. filed.
23	Dec 17 1990	X	Brief amici curiae of Association of American Publishers, Inc., et al. filed.
24	Dec 17 1990	X	Brief of respondents New Yorker Mag., Inc., et al. filed.

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Entry	Date	Note	Proceedings and Orders
25	Dec 17 1990	X	Brief amici curiae of Time Inc. Magazine Company, et al. filed.
26	Dec 17 1990		Lodging received.
27	Jan 3 1991	X	Reply brief of petitioner Masson filed.
28	Jan 14 1991		ARGUED.

89-1799

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY M. MASSON,
Petitioner

V.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. AND
JANET MALCOLM,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES O. MORGAN, JR.
Counsel of Record

PAUL RICHARD KLEVEN
Law Offices of Charles O. Morgan, Jr.
450 Sansome Street
Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether, and to what extent, the First Amendment protects the publication of deliberately altered or manufactured quotations that are attributed to and defame a public figure.

2. Whether a court may resolve factual disputes against a public figure in granting a motion for summary judgment made by defendants in a defamation action.

3. Whether there is an "incremental harm" doctrine that would render nonactionable a deliberately fabricated quotation attributed to a public figure which defamed him, because the public figure's actual remarks were provocative or bombastic.

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Petitioner Jeffrey M. Masson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered and filed in the above-entitled proceedings on August 4, 1989.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated August 4, 1989, is reported at 881 F.2d 1452, and appears in Appendix A hereto. The opinion of the United States District Court for the Northern District of California, Eugene F. Lynch, District Judge, Presiding, dated August 17, 1987, is reported at 686 F.Supp. 1396, and appears in Appendix B hereto; an earlier opinion of Judge Lynch, dated August 19, 1986, appears in Appendix C hereto. The order of the Ninth Circuit denying a petition for rehearing, dated February 15, 1990, appears in Appendix D hereto.

JURISDICTION

The judgment and opinion of the Ninth Circuit Court of Appeals were entered and filed on August 4, 1989. On August 18, 1989, petitioner timely filed a Petition for Rehearing And Suggestion of Appropriateness of Rehearing En Banc, which was denied by order filed February 15, 1990. The petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This libel action arose out of respondent Janet Malcolm's article about petitioner Jeffrey M. Masson, which was published by respondent The New Yorker Magazine, Inc. and, in book form, by respondent Alfred A. Knopf, Inc. Masson alleged that Malcolm's article attributed false quotations to him which were defamatory. The Ninth Circuit, while assuming that Malcolm deliberately altered Masson's actual remarks, has affirmed summary judgment against him, holding that Masson could not establish with convincing clarity that respondents acted with actual malice.

In 1980-81, petitioner was the Projects Director of the Sigmund Freud Archives. While doing research in the Archives, he discovered previously suppressed material regarding Freud's "seduction theory," an early hypothesis that childhood sexual abuse caused certain emotional disorders. The material, which concerned Freud's celebrated abandonment of the "seduction theory" in favor of his later view that patients merely imagined such abuse, led Masson to believe that Freud had improperly discarded the theory despite

knowledge that the abuse actually occurred.

Dr. K.R. Eissler and other senior members of the Archives, including Freud's daughter, Dr. Anna Freud, vehemently rejected Masson's findings and fired him. Respondent Janet Malcolm, a staff writer on the *New Yorker* magazine, contacted Masson in October, 1982 and asked to interview him about the controversy. Masson agreed. When they met for the first interview, Malcolm asked if she could tape record the interview to ensure there were no misquotations, and Masson again agreed.

Malcolm ultimately interviewed Masson for more than 40 hours. She repeatedly assured him that all interviews were on tape and all quotes would be verbatim. (Masson Decl. CR 100, pp. 2-3). She also told her editor that all quotes were on tape. During a conversation with a fact checker from the *New Yorker* prior to publication, however, Masson discovered that several quotations were inaccurate. He told the fact checker that there were many errors, that it would be necessary to verify all quotations, and that she should tell Malcolm of his concern and report back to him. There were no further communications prior to the *New Yorker's* publication of the article. (Masson Decl. CR 100, p. 6).

Unfortunately, as Masson feared, the article contained many misquotations. In the article, for example, Malcolm stated that Masson compared his affair with an older graduate student to his relationship with the senior members of the Archives in the following words:

> She [the graduate student] said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room — you're just a social embarrassment anywhere else, though you do fine

> in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo — you get your pleasure from him, but you don't take him out in public."*
> (emphasis added)
> (App. A at A 12-13).

Masson never called himself an "intellectual gigolo," and nothing in the emphasized portion of the above quote appears in the tape recordings. The tapes do contain the following statement, which was not in the article:

> [Eissler and Anna Freud] felt, in a sense, I [Masson] was a private asset but a public liability. They like me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.
> (App. A at A-13).

Malcolm also purportedly quoted Masson discussing his plans for Anna Freud's house, Maresfield Gardens. On the tape, Masson had said:

> "It's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and — Well, that's what it needs, but it is an incredible

> storehouse. I mean the library . . . ."
> (App. A at A-80) (Kozinski, J., dissenting).

Malcolm's typed manuscript of the article reads, "Sun would have come pouring in, people would have come, there would have been parties and laughter and fun." This sentence was crossed out, and the following sentence, which appeared in the article, was handwritten above it: "Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun." This last sentence is not on any of the tape recordings, and Masson never made the remark, though he did in other contexts discuss with some regret promiscuity during his youth.

The article contained another speech, never made by Masson and entirely absent from the tapes, in which he allegedly boasted about the reaction to a book he was writing about his discovery:

> "They [analysts] will want me back, they will say that Masson is a great scholar, a major analyst — after Freud, he's the greatest analyst who ever lived."
> (App. A at A-38). (Kozinski, J., dissenting).

Finally, Masson related to Malcolm a conversation in which Dr. Eissler pressured him to keep quiet about his discoveries so as not to "poison Anna Freud's last days." In the article, Masson asked:

> "Why should I do that?" [Eissler responded] "Because it

is the honorable thing to do." Well, he had the wrong man.
(App. A at A-28).

These remarks do appear on the tapes, but the actual remarks have been edited. Masson actually related the exchange as follows (the deleted portions are emphasized):

> "You know, why should one do that?" "Because it's the honorable thing to do, *and you will save face, and who knows, if you never speak about it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?"* Well, he had the wrong man.
> (App. A at A-29).

Contending that the above misquotations and many others of similar import were defamatory or placed him in a false light, Masson, a California resident, filed this diversity action pursuant to 28 U.S.C. §1332 against New York residents Malcolm, The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. On August 17, 1987, Judge Eugene F. Lynch of the United States District Court for the Northern District of California granted summary judgment in favor of all defendants, concluding that "[n]o clear and convincing evidence exists that would justify a finding that [defendants] entertained serious doubts about the truth of the disputed passages." (App. B at B-28).

The Ninth Circuit Court of Appeals affirmed the summary judgment against petitioner on August 4, 1989. Judge Arthur L. Alarcon wrote the majority opinion, in which he was joined by Judge Cynthia Holcomb Hall. Judge Alex Kozinski filed a

lengthy dissenting opinion.

Although the Court, for purposes of reviewing the summary judgment, "assume[d] the quotations were deliberately altered," (App. A at A-5), it determined that Masson did not establish with convincing clarity that respondents acted with knowing or reckless falsity. (App. A at A-30). The Court held that an author may "fictionalize quotations 'to some extent,'" determining that there could be no inference of actual malice:

> provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, . . . or do not "alter the substantive content" of unambiguous remarks actually made by the public figure, . . .
> (App. A at A-10-11).

The Court discussed each of the allegedly defamatory statements and held that Masson would not be able to prove clearly and convincingly that any were made with actual malice. For example, Masson's statement that Eissler "had the wrong man" was ambiguous, the Court found, in that it was unclear whether Masson was "the 'wrong man' to keep silent for selfish purposes or the 'wrong man' to do something honorable." Malcolm's decision to edit the quote so that Masson clearly refused to act honorably was therefore a "rational interpretation" of Masson's ambiguous remarks. (App. A at A-29).

Regarding Masson's fabricated prediction that analysts would call him "the greatest analyst who ever lived," the Court found that it "reflects the substance of Masson's self-appraisal" in light of other "egotistical and boastful" statements

that Masson actually made. A jury therefore could not conclude that Malcolm entertained serious doubts about the passage's accuracy. (App. A at A-18).

In discussing the statement about Maresfield Gardens, the Court did not explicitly apply either prong of its holding, but found broadly that "the 'sex, women, fun' quote is consistent with Masson's description of his life style and conception of 'fun.'" (App. A at A-17).

The Court determined that the phrase "intellectual gigolo" was a rational interpretation of Masson's actual comments and did not alter the substantive content of Masson's actual description of himself as a private asset but a public liability. (App. A at A-14). The Ninth Circuit similarly dismissed Masson's claims of actual malice regarding the remaining altered quotations.

Finally, the Court held that the phrase "intellectual gigolo" was not defamatory because, *inter alia*, the "incremental harm" to reputation caused by the phrase, beyond the harm caused by the nonactionable remarks in the article, was nominal or nonexistent. Given the "general tenor of the article and the many provocative, bombastic statements indisputably made by Masson . . . ," (App. A at A-16), the defamation claim was not actionable.

REASONS FOR GRANTING THE WRIT

I

DECISION INHIBITS FREEDOM OF SPEECH BY EXTENDING CONSTITUTIONAL PROTECTION TO CALCULATED FALSEHOOD

The Ninth Circuit affirmed a summary judgment against petitioner despite its assumption that respondents had "deliberately altered" the disputed quotations. (App. A at A-5). The broad privilege thus granted, headlined in the August 21, 1989, issue of *Time* magazine as "The Right To Fake Quotes,"[1] is at odds with the decisions of this Court. It jeopardizes not only "the individual's right to the protection of his own good name," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), but also the "free flow of opinions and ideas" that is "[a]t the heart of the First Amendment." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

In the Ninth Circuit today, "authors are given license to invent quotations on the basis of what they perceive to be a speaker's character" (App. A at A-46 (Kozinski, J., dissenting))." The First Amendment protects freedom of speech because it is "essential to the common quest for truth," *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984), but truth is not served when the

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[1]The press itself has rejected the privilege handed to it by the Ninth Circuit. Even if "concoct[ing] the perfect quote to make the point" is constitutionally protected, *Time* magazine calls the practice "morally indefensible," and quotes Bill Monroe, editor of the Washington Journalism Review as follows: "'I don't know how any journalist can be happy with a judge condoning tampering with specific quotes.'" Henry, "The Right To Fake Quotes: A journalist's legal victory raises questions about ethics," *Time*, August 21, 1989, at 49. *Los Angeles Times* editor Shelby Coffee has stated "'When we use quote marks, what's inside those quote marks should be what the person said.'" Rosenstiel, "Wide Respect For Sanctity of the Spoken Word; Most Newspapers Have Strict Rules On Quotes," *Los Angeles Times*, August 5, 1989, §1, at 29, col. 1.

This rejection of the privilege is consistent with long-standing journalistic practices. See App. A at A- 57-69 (Kozinski, J., dissenting). In a non-litigation context, William Shawn, former editor-in-chief of the *New Yorker*, has specifically stated, "We do not create conversations." See App. A at A-66 (Kozinski, J., dissenting).

public receives only the opinions of the media disguised as the actual remarks of public figures. A decision that will encourage writers to manufacture defamatory quotations can only interfere with any search for truth.

Writers betray First Amendment values when they illustrate their personal opinions of public figures by using quotation marks to deliberately deceive the reading public about what a public figure actually said, and about the writer's role as editor, interpreter and fabricator. Relying on traditional assumptions about written English, readers will initially give undue weight to the apparently verbatim quotations. Unless this Court provides guidance to the courts, readers will eventually abandon those assumptions and distrust all purported quotes.

If the Ninth Circuit's opinion remains in effect, quotations of public figures are likely to be rare as well as suspect. Previously, *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976), protected public figures from manufactured quotations. The Ninth Circuit's decision eviscerates that protection unless the public figure has not spoken to the press. (App. A at A-7 n.1, A-10, see § II *infra*). Faced now with uncertainty as to how their remarks will be altered, some public figures will simply decline all interviews. As this Court recently warned:

> Uncertainty as to the scope of the constitutional protection can only dissuade protected speech- . . . *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ____, 109 S.Ct. 2678, 2695 (1989).

Judge Kozinski's dissent asks the question at the heart of this case: "is the right to doctor quotations important to the

operation of a free and robust press?" (App. A at A-57 (Kozinski, J., dissenting)). The Appellate Court's implicit, positive response to this question contradicts this Court's persistent refusal to extend constitutional protection to "calculated falsehood." *Garrison v. Louisiana*, 379 U.S. 64, 75, (1964); *Connaughton*, 109 S.Ct. at 2696, n. 34.

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . , should enjoy a like immunity.
> *Garrison*, 379 U.S. at 75.

Falsehoods innocently stated about a public figure are protected even though they "interfere with the truth-seeking function of the marketplace of ideas . . . ." *Hustler Magazine*, 485 U.S. at 52. The First Amendment demands some "breathing space" around speech that does have constitutional value, and so protects innocent falsehoods because they are "'nevertheless inevitable in free debate.'" *Id.*

There is nothing inevitable about deliberately altered and manufactured quotations, and the Constitution must not protect those "'unscrupulous and skillful enough to use the deliberate or reckless falsehood'" as a tool. *Connaughton*, 109 S.Ct. at 2696, n. 34 (quoting *Garrison*, 379 U.S. at 75).

> For the use of the known lie as a tool is at once at odds with . . . the orderly manner in which economic, social, or political change is effected.
> *Id.*

II

DECISION APPROVING DELIBERATE ALTERATION OF QUOTES PRESUPPOSES PUBLICATION WITH KNOWING FALSITY AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

This Court has been properly skeptical of "deliberate falsification," leaving it for the finder of fact to determine whether a publication was made without actual malice if it "is fabricated by the defendant or the product of his imagination." *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). Although the defamatory quotations fabricated by Malcolm were the product of her imagination, the Ninth Circuit inexplicably held that a factfinder could not constitutionally have ruled in Masson's favor.

This decision directly conflicts both with the Seventh Circuit's decision in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) and with a California opinion. The Ninth Circuit's holding also contrasts with the approach to this issue taken by the Second and Third Circuits in cases involving the translation of quotations. These other Courts, under their different approaches, would have allowed Masson to present his case to the jury. Only this Court can bring coherence to an area of the law thrown into further confusion by this decision.

In *Carson*, the defendant writer justified his fabricated quotations of Johnny Carson as "simply a logical extension of what must have gone on from the facts I read . . . . " *Carson*, 529 F.2d at 212. Writing for a unanimous court, Judge Sprecher reversed summary judgment for defendants:

> If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. . . .
>
> The defendants in fabricating and imagining "facts" necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness of their probable falsity.
> *Carson*, 529 F.2d at 213.

The Ninth Circuit attempted to avoid a conflict with the Seventh Circuit on the ground that Malcolm actually interviewed Masson, while the defendant in *Carson* never spoke to the plaintiff. (App. A at A-7 n.1, A-10). But this distinction would make no difference to the *Carson* Court: Malcolm ***knew*** Masson had not made the defamatory statements she attributed to him because she knew exactly what he had actually said, and had tape recordings of the conversations. Even if the alterations were due to a faulty memory, her failure to compare the tapes with her planned article could only be considered a "purposeful avoidance of the truth." *Connaughton*, 109 S.Ct. at 2698.

A California Court has adopted a straightforward approach to this issue similar to *Carson's*. In *Bindrim v. Mitchell*, 92 Cal.App.3d 61, *cert denied* 444 U.S. 989 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Ca1.3d 835, 846, n. 9 (1986), a case discussed at length by the majority (App. A at A-5-7), a writer was found liable for manufacturing quotations allegedly made by a psychologist at a therapy session. The Court determined that the writer's:

> reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter[.] Since she attended sessions, there can be no suggestion that she did not know the true facts.
> *Bindrim*, 92 Cal.App.3d at 72-73 (quoted in App. A at A-6).

The Ninth Circuit did not follow *Bindrim's* reasoning and cited *Carson* only for the principle that:

> A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination. *Carson*, 529 F.2d at 213.
> (App. A at A-10).

But the Court's holding actually conflicts with *Carson*, because Masson contends and the Court seemingly agrees that most of the disputed language attributed to him —"the greatest analyst who ever lived," "sex, women, fun," "intellectual gigolo" — was wholly the product of Malcolm's imagination. Under *Carson*, a jury could infer actual malice from those fabricated quotations.

The Second and Third Circuit Courts of Appeals have also struggled with the question of liability for misquotation. While their decisions do not assume that deliberate alterations were made with actual malice, as do *Carson* and *Bindrim*, they do not provide writers with the sweeping immunity granted by the Ninth Circuit. In *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987), defendants published a newspaper in Spanish which stated in a headline that the

mayor had called Hispanics "cerdos," a Spanish term which can be translated as a "pig." *Dunn*, 833 F.2d at 451 n.2. The mayor had not called Hispanics "pigs" but had complained, in English, about a litter problem caused by immigrants. There was no direct Spanish translation of the English terms "litterbug" or "litterer." The Court found that "cerdos" was a fair, if inadequate, translation, less inflammatory than others rejected by defendants. The use of quotation marks in Spanish would not necessarily signify a direct quote. *Id.* at 451.

Under the circumstances, the Third Circuit concluded that the headline was a "rational interpretation of remarks that bristled with ambiguities," but it did not hold, as the Ninth Circuit would, that a public figure claiming a mistranslation could never prove actual malice; instead, the Third Circuit held that the plaintiff must have "countervailing factual evidence of actual malice," which Dunn completely lacked. *Dunn*, 833 F.2d at 452.

The Ninth Circuit in the instant case ignored a "mountain of countervailing factual evidence," (App. A at A-51 (Kozinski, J., dissenting)), which it treated as irrelevant to its rule that a public figure may not prove actual malice as long as deliberately altered quotations were "rational" interpretations of ambiguous remarks. (App. A at A-10-11). This result conflicts with *Dunn* and its authorities, *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

Neither *Pape* nor *Bose* protects deliberate fabrication of purportedly verbatim quotes from tape-recordings. On the contrary, "when the alleged libel purports to be an eyewitness or other direct account of *events that speak for themselves*," an inaccurate statement may support a finding of actual malice. See *Bose*, 466 U.S. at 512 (quoting *Pape*, 401 U.S. at 285)

(emphasis in original). A public figure's actual remarks speak for themselves, and as long as a writer claims to be quoting directly, rather than paraphrasing, she is not protected by *Bose*, *Pape* or *Dunn*.

Finally, the Ninth Circuit attempted to reconcile *Hotchner v. Castillo-Puche*, 551 F.2d 910.(2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977), in which the Second Circuit found no actual malice where an English-language edition of a book contained a "bowdlerized" version of a nondefamatory Spanish quote. The Court determined that the Spanish quote could have been published in good faith since it could not be independently verified and there were "no convincing indicia of unreliability." *Id.* at 914. The English version neither increased the defamatory impact nor altered the "substantive content" of the Spanish quote, so its publication was also protected. *Hotchner*, 551 F.2d at 914.

The Ninth Circuit, however, granted constitutional protection in any case where a deliberately altered quotation arguably does not change the substantive content of a public figure's actual remarks, whether or not the alteration increases the defamatory impact. (App. A at A-10-11). Applying this concept to the "greatest analyst who ever lived" passage, the Court determined that the "fictionalized quotation actually reflects the substance of Masson's self-appraisal. (App. A at A-18).

The Second Circuit's approach in *Hotchner* would never condone this boundless privilege. Masson did make boastful remarks, but as Judge Kozinski notes:

> This rationale is explosive. What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or

> callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.
> (App. A at A-39 (Kozinski, J., dissenting)).

III

COURTS NEED GUIDANCE ON PROPER APPLICATION OF *ANDERSON v. LIBERTY LOBBY*

The courts of appeal have struggled for some time with the problem of deciding motions for summary judgment in libel cases. The decision below demonstrates the serious need for this Court's further guidance to ensure that other courts do not erroneously dismiss actions after rejecting the plaintiff's testimony.

In deciding whether Masson actually called himself an "intellectual gigolo", the Ninth Circuit baldly resolved a factual dispute against Masson:

> Masson indisputably made numerous statements which were the substantive equivalent of the "intellectual gigolo" quote Malcolm used; Masson's only proof that he never said such a thing is his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the applicable standard.
> (App. A at A-13-14 n. 4).

Judge Kozinski aptly summarized the meaning of this ruling: "In a swearing contest between reporter and subject, the reporter always wins." (App. A at A-44 n.7 (Kozinski, J.,

dissenting)).

This Court's decisions on summary judgments in libel cases do not allow the Ninth Circuit to resolve swearing contests in favor of either party. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court held that a public figure libel plaintiff cannot survive a motion for summary judgment if the evidence in opposition to the motion "is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Anderson*, 477 U.S. at 254. The Court warned, however, that a court ruling on such a motion cannot weigh the evidence or draw adverse inferences from that evidence:

> The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255.

The Court did not believe Masson's denial and, as particularly apparent in its conclusion that "intellectual gigolo" is equivalent to a statement that Masson was a "public asset but a private liability," gave respondents the "benefit of every doubt." (App. A at A-42 (Kozinski, J., dissenting)).

Although the Fifth Circuit properly applied *Anderson* in *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987), as did the Third Circuit in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988), the Ninth Circuit has departed from *Anderson* here in a way that will encourage "more erratic and inconsistent" rulings on defamation summary judgment motions. *Anderson*, 477 U.S. at 272-73 (Rehnquist, J., dissenting). This Court should therefore grant certiorari to ensure that other courts do not err in applying *Anderson's* standard to particular

cases.

A grant of certiorari would also help to determine whether the *Anderson* standards should even apply to this case. The Ninth Circuit's holding, though couched in terms of actual malice, really turns on the question of falsity. The Court assumed respondents knew that the quotations in the article differed from what Masson actually said, but decided that the knowing difference did not amount to knowing falsity because the altered quotes were similar to actual remarks.[2]

There can be little doubt that Masson's case would go to a jury if the standard were preponderance of the evidence rather than clear and convincing evidence. The Court erred in applying the higher standard to its particular formulation, and in doing so conflicts with the Second Circuit's decision in *Goldwater v. Ginzburg*, 414 F.2d 329, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1099 (1970). This Court noted a conflict among the circuits on this issue but explicitly left the question open in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2682 n. 2 (1989).

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[2] See the careful analysis of this issue in *Masson v. New Yorker Magazine: Actual Malice and Direct Quotations - The Constitutional Right To Lie*, 65 Notre Dame L.Rev. 566, 568-70, 576-81, (1990).

IV

ADOPTION OF INCREMENTAL HARM DOCTRINE CONFLICTS WITH D.C. CIRCUIT

In further disposing of the "intellectual gigolo" passage, the Ninth Circuit found that it caused only nominal damage considering Masson's "provocative, bombastic statements," and so was non-defamatory under the "'incremental harm branch' of the 'libel-proof' doctrine." (App. A at A-16). Under that doctrine, if challenged statements cause only nominal "incremental harm" beyond that caused by nonactionable portions of a publication, there can be no action. (*Id.*)

The Ninth Circuit's adoption of this doctrine creates a "square conflict with the District of Columbia Circuit." (App. A at A-78 n. 21 (Kozinski, J., dissenting)). The D.C. Circuit explicitly rejected the incremental harm doctrine in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) *rev'd on other grounds*, 477 U.S. 242 (1986). The Court rejected the theory:

> because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little good in all of us - or perhaps upon the pessimistic premise that no matter how bad someone is, he can always be worse.
> *Id.*

As this Court recently noted, defendants are not immune from suit because part of the publication is true:

> "[T]he defamer may be [all] the more successful when he baits the hook with truth."
>
> *Connaughton*, 109 S.Ct. at 2698 n.37 (quoting *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (en banc)).

District courts within the Ninth Circuit have now followed its precedent and adopted the incremental harm doctrine. *Crane v. Arizona Republic*, 729 F.Supp. 698, 707 (C.D.Cal. 1989). The Ninth Circuit's decision on this issue must be reversed to avoid conflicts between the circuits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted

CHARLES O. MORGAN, JR.
PAUL RICHARD KLEVEN
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[881 F.2d 1452]

[Nos. 87-2665, 87-2700, August 4, 1989]

[As modified February 15, 1990]

JEFFREY M. MASSON,
Plaintiff/Appellant /Cross-Appellee,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., AND JANET MALCOLM
Defendants/Appellees/Cross-Appellants

OPINION

ALARCON, Circuit Judge:

In this libel action, plaintiff-appellant Jeffrey M. Masson appeals from the order of the district court granting summary judgment to defendants-appellees The New Yorker Magazine, Inc. ("The New Yorker"), Alfred A. Knopf, Inc. ("Knopf"), and Janet Malcom. We affirm.

I.

In 1983, Janet Malcolm published a two-part article in The New Yorker magazine concerning the termination of psychoanalyst Jeffrey M. Masson from his position as Projects Director of the Sigmund Freud Archives (Archives). The article, subsequently reprinted in book form by publisher Knopf, was largely based upon Malcolm's tape-recorded interviews with Masson. In the article, Malcolm described the struggle between Masson and other board members of the Archives, notably Dr. Kurt Eissler and Dr. Anna Freud, over Sigmund Freud's abandonment of the "seduction theory"—a hypothesis that assumes that certain mental illnesses originate in sexual abuse during childhood. Malcolm discussed Masson's claim that his contract with the Archives was terminated because he "went public" with his views that Freud abandoned the seduction theory simply to further his career and placate his colleagues.

On November 29, 1984, Masson filed this diversity action in the district court against Malcolm, The New Yorker, and Knopf. Masson contended that the defendants libeled him and placed him in a false light in violation of

Cal. Civ. Code § 45 (West 1982). Masson contended that Malcolm fabricated words attributed to him within quotations marks, and misleadingly edited his statements to make him appear "unscholarly, irresponsible, vain, [and] lacking impersonal [sic] honesty and moral integrity." He also charged that The New Yorker and Knopf knew of Malcolm's misconduct prior to publication of the article and book.

Each of the defendants moved for summary judgment. The district court granted these motions on the ground that Masson had failed to establish actual malice. The district court concluded that "[n]o clear and convincing evidence exists that would justify a finding that [Malcolm, The New Yorker, or Knopf] entertained serious doubts about the truth of the disputed passages." 686 F. Supp. at 1407

II.

The California Civil Code states: "Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45 (West 1982). In suits brought by public figures, California courts have limited recovery of damages under the statute to cases in which the plaintiff can demonstrate that the defendant published the falsehood with actual malice, as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "[T]he *New York Times* decision superimposed a constitutional standard on the common law of libel. If the person defamed is a public figure, [he must prove] that the libelous statement was made with '"actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Readers' Digest*

Ass'n v. Superior Court, 37 Cal. 3d 244, 256, 208 Cal. Rptr. 137, 144, 690 P.2d 610 (1984) (quoting *New York Times*, 376 U.S. at 279-80, 84 S. Ct. at 725-26). In interpreting the actual malice standard, California courts have looked to federal precedent. See *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 860-71, 231 Cal. Rptr. 518, 534-42, 727 P.2d 711 (1986) (drawing on federal applications of the *New York Times* standard). Because this is a diversity action, we must follow the California Supreme Court's practice of using both California and federal decisions to define actual malice in determining whether summary judgment was appropriate. Our decision, however, ultimately rests on whether the statements at issue constituted malice as a matter of federal constitutional law.

"A grant of summary judgment is reviewed de novo. Our review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c)." *Coverdell v. Department of Social & Health Serv.*, 834 F.2d 758, 761 (9th Cir. 1987) (citation omitted). The standard governing summary judgment in the district courts in libel actions brought by public figures was recently described by the Supreme Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). "Where the factual dispute concerns actual malice . . . , the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence . . . ." *Id.* at 251.

III.

A. "Fictionalized" Quotations

1. Legal Framework

[1] Masson admits that he is a public figure and that he was constitutionally required to prove that Malcolm was motivated by actual malice. He contends he presented sufficient evidence of actual malice to defeat Malcolm's summary judgment motion. He argues that a jury could find actual malice by clear and convincing evidence based solely on the evidence he presented showing that Malcolm had deliberately "fabricat[ed] quotations ascribed to him." As evidence of such deliberate fabrication, Masson presented evidence that the several quotations attributed to him did not appear in the tape recordings of his conversations with Malcolm, that Malcolm herself had altered quotations, and that he had alerted staff at The New Yorker that the quotations had been altered prior to publication. For the purpose of this appeal, we assume the quotations were deliberately altered.

[2] Neither the United States Supreme Court nor the California Supreme Court has had occasion to address the question whether a finding of malice may hinge upon evidence showing that a defamatory statement attributed to a person by using quotation marks does not contain his or her exact words. One California appellate court, however, has addressed the question, as have several federal courts of appeals.

In *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy*, 42 Cal. 3d at 846 n. 9, an author, in an alleged novel, quoted an allegedly fictional psychiatrist as demanding, in a profane and insensitive manner, that a patient "drag" his wife to a "nude marathon." *Id.* at 70-71. The plaintiff, a psychologist who is a pubic figure, sued for libel claiming that book was actually about him, and that the

defamatory quotations attributed to him were fictionalized. The plaintiff produced a tape recording of a therapy session which the author attended. The tape disclosed that the psychologist had merely suggested, in a non-profane and sensitive manner, that a patient bring his wife to a nude marathon. *Id.*

The jury found that the book was not fiction, that the quotations attributed to the psychologist were false and defamatory, and that the defendant published the quotations with actual malice. The defendant appealed, claiming inter alia, that clear and convincing evidence did not support the jury's finding of malice. *Id.* at 72. The California Court of Appeals disagreed and affirmed. The court's holding is contained in the following passage:

> [The defendant's] reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter[.] Since she attended sessions, there can be no suggestion that she did not know the true facts. Since 'actual malice' concentrates solely on defendants' attitude toward the truth or falsity of the material published, and not on malicious motives, certainly the defendant . . . was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

Id. at 72-73 (citations omitted) (footnotes omitted).[1]

In *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3rd Cir. 1987), the record showed that the Mayor of Elizabeth, New Jersey, in discussing his city's problems with litter, stated:

> You have a lot of new people moving into the City of Elizabeth, some coming from foreign lands where abject poverty was something they lived with everyday and they have not yet been assimilated into our type of society, and it will take a great deal of time for some of them to respect the rights and the properties of other people, and above all, to respect a city that offers them a home in what I consider to be a wholesome environment.

Id. at 448. A Spanish-language newspaper summarized these comments in a headline which, when translated into English, read, "Elizabeth Mayor on the Attack: Calls Hispanics 'Pigs.'" *Id.*

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[1]The dissent argues this case is similar to *Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985). We disagree. First, *Selleck* is inapplicable because it involved only the question whether quotations attributed to Tom Selleck's father, apparently a private figure, could have a defamatory impact. In reversing the trial court's decision to grant a demurrer on the plaintiff's defamation claim, the court never discusses "actual malice"; in fact, the *Selleck* court assumes that the plaintiff was never interviewed and that the quotes were wholly fabricated. 166 Cal. App. 3d at 1132; 212 Cal. Rptr. at 844. Even if one assumes that the court decided sub silentio that the plaintiff was a public figure and that he had made a sufficient showing of actual malice, *Selleck* is consistent with the *Carson* case discussed *infra* at A-9-10.

The Mayor sued the newspaper for libel. He argued that the newspaper, "by enclosing'cerdos' ['pigs'] in single quotation marks, purported to proclaim that the mayor had in fact used the word 'pigs' in discussing the litter problem." *Id.* at 450. He contended that the jury could find that the newspaper acted maliciously solely on the basis of evidence demonstrating that the "pigs" quote was fictionalized.

The district court in *Dunn* granted summary judgment to the newspaper finding the mayor "had failed to present clear and convincing evidence that the newspaper published the headline with actual malice." *Id.* at 449. The Third Circuit agreed. The Third Circuit held that the "the headline was a rational interpretation of remarks that bristled with ambiguities." *Id.* at 452. "[W]e are convinced that the word [pigs] was a fair, albeit inadequate, translation of the relatively new additions to the American vocabulary of the words 'litter,''litterer,' or 'litterbug' . . . ."*Id.*

In *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977), the evidence showed that the author of a book published in Spanish quoted author Ernest Hemingway as describing the public figure plaintiff as "dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." *Id.* at 914. The publisher of the English-language edition of this book "toned down" this quotation, *Id.* at 912; it quoted Hemingway as stating:"I don't really trust him [the plaintiff] . . . ."*Id.*

The plaintiff sued for libel contending, inter alia, that the evidence it presented showing that the publisher "knowingly published a bowdlerized version of Hemingway's alleged statement" was sufficient to establish that the publisher acted

maliciously. *Id.* at 914. The Second Circuit concluded in *Hotchner* that "[i]t is true that in transforming Hemingway's words to the much milder 'I don't trust him,' . . . [the publisher] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement . . . ."*Id.* Accordingly,"there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth." *Id.*

In *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), a newspaper reporter wrote an article describing "in copious detail the supposed struggle between [Johnny] Carson and . . . NBC executives wherein Carson was seeking to move the [Tonight] show [from New York to Hollywood] and NBC was resisting the move." *Id.* at 212. "The article contains supposed quotations by Carson to the executives and their responses and reactions." *Id.*

The plaintiff in *Carson* presented evidence showing that the reporter admitted he had "completely fabricated" the quotations attributed to the plaintiff. *Id.* Carson argued that malice could be inferred solely on the basis of this evidence. The district court disagreed and granted summary judgment to the defendants. *Id.* at 208.

In reversing the district court's order, the Seventh Circuit commented as follows:

> In the catalogue of responsibilities of journalists . . . . must be a canon that a journalist does not invent quotations and attribute them to actual persons. If a writer can sit down in the quiet of his cubicle and create

> conversations as a 'logical extension of what must have gone on' and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim . . . .
>
> Because of . . . the wholly imagined but supposedly precisely quoted conversations regarding the purported struggle preceding the westward move of the Tonight Show, the plaintiffs are entitled to a jury's determination of whether actual malice existed.

Id. at 213.

[3] The state of the current law governing the defamatory nature of statements ostensibly ascribed to another person by the use of quotation marks can be summarized as follows: A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination. *Carson*, 529 F.2d at 213. An author may, however, under certain circumstances, fictionalize quotations "to some extent." *Hotchner*, 551 F.2d at 914; *but see Bindrim*, 92 Cal. App. 3d at 70, 155 Cal. Rptr. at 34 (an author's privilege to alter quotations is not unlimited). Malice will not be inferred from evidence showing that the quoted language does not contain the exact words used by the plaintiff provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by

the public figure, *Dunn*, 833 F.2d at 452[2]; *cf. Bose*, 466 U.S. at 512-13 (1984) (malice may not be inferred from inaccurate language chosen to describe an event where the description is "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities'" (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)), or do not "alter the substantive content" of unambiguous remarks actually made by the public figure, *Hotchner*, 551 F.2d at 914.[3]

With these principles in mind, we turn to the question whether actual malice can be inferred from any of the quotations attributed to Masson.

2. The Challenged Quotations

a. "It Sounded Better"

Malcolm quoted Masson as stating that he changed his middle name from Lloyd to Moussaieff because "it

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[2]The dissent argues that the *Dunn* rationale applies only in situations involving translations from one language to another. Dissent, at A-49-50. We disagree. The problem in *Dunn* was not the translation of the Mayor's words but the summary of those remarks. The newspaper editors in *Dunn* were not attempting to translate a particular word for which there was no exact equivalent in Spanish; instead, they sought to "express the gist of the mayor's remarks" by means of the fabricated quotation. 833 F.2d at 451. The problems created by summarization obviously are not unique to translation.

[3]The dissent argues that *Hotchner* only stands for the proposition that malice will not be inferred from an altered quotation when the alteration does not increase the defamatory impact of the quotation. Dissent, at A-51-52. We disagree. The Second Circuit refused to infer malice in *Hotchner* not only because the alteration did not alter the defamatory impact of the quotation, but also because the alteration did not "alter the substantive content" of the quotation. *Hotchner*, 551 F.2d at 914.

sounded better." This statement does not appear in tape-recorded interviews. On the tape recordings, Masson states that he changed his middle name to Moussaieff because, inter alia, he "just liked it."

The district court stated that it could "see little difference between Masson's own words and those attributed to him by Malcolm." Accordingly, the district court held that the evidence Masson presented showing a discrepancy between his statements on the tape and those attributed to him in the article was "not sufficient to raise a triable question of fact on the issue of actual malice."

[4] We agree with the district court's observation. We cannot perceive any substantive difference between the phrases "it sounded better" and "[I] just liked it." Thus, although Malcolm did not quote Masson verbatim, the words attributed to him did not alter the substantive content of his statement. The district court did not err in granting summary judgment against Masson concerning the words "it sounded better."

b. "Intellectual Gigolo"

Malcolm quotes Masson as stating, in discussing an affair with a graduate student:

> She [the graduate student] said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room — you're just a social embarrassment anywhere else, though you do fine in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo -- you get your pleasure from him, but you don't take him out in public."*

(emphasis added).

The underscored portion of the above quote is not in the tape-recordings. It does appear, however, in Malcolm's interview notes.

Masson contended below that both the quotation and Malcolm's note were fabricated. The district court assumed for the purpose of disposing the summary judgment motion that Masson did not refer to himself as an intellectual gigolo. The district court noted, however, that the tape of this conversation contains the following comment:

> [Eissler and Anna Freud] felt, in a sense, I [Masson] was a private asset but a public liability. They like me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.[4]

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[4]Other portions of the taped interviews reveal that Masson repeatedly boasted of his ability to seduce or "charm" the senior analysts, including Kurt Eissler and Anna Freud. He told Malcolm, for example, that

> "I had managed to worm my way into the good graces of Eissler and Anna Freud and Muriel Gardner through charm and this had worked on them, and they had fallen into a spell. I had mesmerized them . . . ."

On other occasions, Masson told Malcolm that Eissler "adored me," and was

The court held that malice could not be inferred from the purported fabrication because Malcolm's "use of the descriptive term 'intellectual gigolo' was a rational interpretation of [these] . . . comments." The district court opined further that "[t]he descriptive term 'intellectual gigolo,' as used in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler."

We believe that the district court accurately assessed Malcolm's interpretation of Masson's characterization of the

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"very easily taken in."

Although Masson argues that "intellectual gigolo" differs form his taped comments in that it has sexual connotations, it also appears that on at least one occasion Masson himself employed sexual metaphors to describe his and other young analysts' relationships with Eissler as "Suck stories. They're great suckers and it's a question of who can suck the most . . . Oh God, did it go through it."

All of these undisputed statements tend to prove that Masson conceptualized his relationship with Eissler and Freud at least in part as an intimate, mysterious, and perhaps surreptitious diversion—not unlike that of a "gigolo." Although we cannot at this stage in the proceedings make credibility determinations or resolve conflicts in the evidence, we can and must evaluate how Masson's actual malice evidence stacks up against the "clear and convincing" standard of proof. Masson indisputably made numerous statements which were the substantive equivalent of the "intellectual gigolo" quote Malcolm used; Masson's only proof that he never said such a thing is his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the applicable standard of proof.

views of Eissler and Anna Freud. While it may be true that Masson did not use the words "intellectual gigolo," Malcolm's interpretation did not alter the substantive content of Masson's description of himself as a "private asset but a public liability" to Eissler and Anna Freud. The district court did not err in determining that Masson did not prove by clear and convincing evidence that Malcolm acted with malice in attributing the words "intellectual gigolo" to Masson.

Moreover, the " intellectual gigolo" quotation is not defamatory. The dissent misreads the "intellectual gigolo" quotation interpreting it as containing Masson's assessment of himself. According to Judge Kozinski, "[f]or an academic to refer to himself as an intellectual gigolo is such a devastating admission of professional dishonesty that a jury could well conclude that it is libelous." Dissent, at A-42. However, a fair reading of the quotation shows author Malcolm is portraying Masson as reporting Kurt Eissler's and Anna Freud's opinions about him. As such, it is difficult to perceive how the quotation is defamatory.

Additionally, the allegedly fabricated "intellectual gigolo" quote is non-defamatory under the "incremental harm branch" of the "libel-proof" doctrine. *See Herbert v. Lando*, 781 F.2d 298, 310-11 (2nd Cir.), *cert. denied*, 476 U.S. 1182 (1986). This doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication; if that "incremental harm" is determined to be nominal or nonexistent, the statements are dismissed as not actionable." *Id.* (citing *Simmons Ford, Inc.* v. Consumers Union, 516 F. Supp. 742 (S.D.N.Y. 1981)).

In *Herbert*, the court held that two statements, which merely implied the same view and were simply an outgrowth

of and subsidiary to statements on which it was held there could be no recovery, were not actionable even if the subsidiary statements were made with actual malice. *Id.* at 312.[5]

Given the general tenor of the article and the many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the "intellectual gigolo" quote was nominal or nonexistent, rendering the defamation claim as to this quote nonactionable.

c. "Moral Cowardice"

Malcolm quoted Masson as stating that Freud's "entire theory after he abandoned seduction was the product of moral cowardice." The precise words used in the quotation do not appear in the tape-recorded interviews. The transcript of the taped conversations, however, contains the following statement. "I think . . . [Freud] was a great and remarkable thinker but he was still a, a man who just lost his courage. He was a brilliant mind who didn't have the courage to stick with things that he knew were true."

We agree that the district court's conclusion that malice was not demonstrated by clear and convincing evidence by the purported fictionalization because Malcolm's "use of the descriptive phrase 'moral cowardice' was a rational interpretation of Masson's [acknowledged] comments." Masson's actual words show that he considered Freud to lack

[5] Although the *Herbert* court denied that it was applying the *Simmons* "incremental harm" doctrine, it recognized that the test was very possibly another variation of the "libel proof" doctrine.

the courage of his convictions. In attributing the "moral cowardice" characterization of Sigmund Freud to Masson, Malcolm did not alter the substantive content of Masson's taped statement.

d. "Sex, Women, Fun"

Malcolm quotes Masson as stating that if he had been allowed to move into Anna Freud's house in London, the house not only would have been "a place of scholarship, but it would also have been a place of sex, women, fun." This statement does not appear in the tape recordings. Instead, Masson stated during a taped interview in discussing the changes he would make to Freud's home: "They're going to be calling the police on me every, every time I give a party or something"; and that "I could have had some fun." Masson also stated that:

> it would take an Act of Congress then [sic] get me out of Anna Freud's house. But sooner or later, the, i—, there, there would have been, you know, just a rising, uh, tide of anger and resentment and people demanding my resignation. But the only person they could demand it of was me. And as long as I wanted to I could say, "Go to Hell."

The district court granted summary judgment to Malcolm on this claim because "the disputed passage was substantially true because the sting of the passage is the same as that of undisputed tape-recorded passages." Masson's taped comments show that he envisioned the Freud house as a site for wild parties. In discussing his personal life with Malcolm,

he boasted of his sexual prowess. For example, he told Malcolm that he had slept with over 1,000 women before he became an analyst. Thus, the "sex, women, fun" quote is consistent with Masson's description of his life style and conception of "fun." The disputed quotation did not establish malice by clear and convincing evidence.

e. "Greatest Analyst Who Ever Lived"

Malcolm quotes Masson as predicting that after the release of his book analysts will say "after Freud, he's [Masson's] the greatest analyst who ever lived." This quotation does not appear in the taped interviews.

The tapes contain the following observations by Masson concerning his status as an analyst: "for better or for worse, analysis stands or falls with me now"; "it's me and Freud against the rest of the analytic world. . . . Not so, it's me. It's me alone"; and "[I] could single-handedly bring down the business [of Freudian psychology]." The district court held "[i]n light of the many egotistical and boastful statements that Masson made in tape-recorded comments . . . plaintiff has not demonstrated clear and convincing evidence from which a reasonable jury could conclude that Malcolm entertained serious doubts about the accuracy of the passage."

We agree with the district court's construction of the words attributed to Masson. The purportedly fictionalized quotation actually reflects the substance of Masson's self-appraisal.

f. "Don't Know Why I Put It In"

Masson told Malcolm that he delivered a paper at an analyst's convention in which he criticized Freud for the alleged "sterility of psychoanalysis." Malcolm quoted Masson as stating to him: "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in." This quotation does not appear in the tape recordings. However, Masson did state during a taped interview that he thought "the last sentence [of the paper blaming Freud for the sterility of psychology] was . . . [a] possibly gratuitously offensive way to end a paper to a group of analysts." He also stated that he does "not know why psychoanalysis is sterile today."

The district court held that "[t]he passage as written is a rational interpretation of Masson's comments, including his characterization of the . . . [sterility remark] as a gratuitously offensive way to end the paper." Our independent review of this claim compels us to reach the same conclusion. The district court correctly concluded that "[n]o reasonable juror could find that this passage provides clear and convincing evidence that Malcolm entertained serious doubts as to the truth of the statement." The words attributed to Masson did not alter the substantive content of his explanation of his evaluation of critical comments he selected to conclude his remarks to an audience of analysts.

g. The Schreber Case

Masson's next two claims relate to the discussion in the article about the Schreber case. Daniel Schreber was an Austrian jurist who was institutionalized at the turn of this century for mental illness. Schreber wrote a book detailing his

various delusions. He explained that he had delusions concerning a "compression-of-the-chest," and that Paul Flechsig, his psychiatrist, wanted to castrate him.

Sigmund Freud conducted a case study on Schreber based on this book. This research formed the basis of Freud's theory on homosexuality. In the case study, Freud treated Schreber's delusions as products of fantasy.

In the 1950's, a well-known analyst named William Niederland investigated Freud's case study of Schreber. He discovered that Schreber's delusions were not entirely fantastical. Niederland discovered that Schreber's father was a tyrant. Schreber's "compression-of-the-chest" delusion derived from his father's use of an invention called the "straightener" on him. This device compressed the chest with iron bars in a supposed effort to improve posture. Moreover, Niederland discovered that Schreber's psychiatrist performed experimental castrations on certain patients.

Masson also investigated Freud's case study of the Schreber case. Masson found a letter Freud had written prior to the publication of the case study which showed that he knew that Schreber's father was a tyrant. Masson also found an article among Freud's papers written by Flechsig describing his experimental castrations of hysterical and obsessional patients. Masson determined that Freud received a copy of this article prior to the publication of his case study on Schreber.

1. "My Discovery"

In her publication, Malcolm quoted Masson as stating with respect to Freud's case study on Schreber:

> It was the same thing with my discovery about the Schreber case. That was even more appalling. I found an 1884 article in Freud's library written by Paul Flechsig, Schreber's psychiatrist, which he [Flechsig] had personally sent to Freud; reporting that he performed castration experiments on hysterical and obsessional patients in his asylum.This means that when Freud wrote his essay on Schreber he knew that castrations had taken place in the asylum where Schreber was held, but he still could write that Schreber suffered from the *delusion* that the great Paul Flechsig wanted to castrate him.

The words "my discovery about the Schreber case" do not appear in the tape recordings. In a taped session, however, Masson describes Niederland's discovery about Schreber as follows:

> I went a step beyond Niederland, but it was important. . . . [I discovered that] Freud has . . . [Flechsig's] article [about experimental castrations] in off-print form in his library! [The article was sent to Freud] [f]rom Flechsig. So Freud knew when he was writing the Schreber case that Flechsig had performed castration!"

Masson contends that Malcolm fictionalized this quotation to make it appear that he was claiming credit for Niederland's initial discovery that Flechsig performed castrations. Masson notes that in the tape-recorded interview he emphasized that Niederland made this initial discovery and he had only taken it one step further.

The district court granted summary judgment to Malcolm with respect to this passage because it found that the "article makes clear the fact that the discovery Masson was claiming was that Flechsig had sent Freud the article and the article was in Freud's library." The district court held that "[n]o reasonable juror could find by clear and convincing evidence that Malcolm entertained serious doubts about the truth" of this passage, given the near identity between Masson's comments on tape and those attributed to him in the article.

The district court correctly analyzed this issue. The quotation attributed to Masson does not alter the substance of Masson's comments about his discovery of the Fleschig paper on castration experiments.

2. "Eissler Would Have Admitted I Was Right"

Malcolm quotes Masson as stating that "[Dr. Kurt] Eissler would have admitted . . . [he] [Masson] was right" in his belief that Freud knew Schreber's concerns about castration had some basis in reality prior to his publication of the Schreber case study. This statement is not on any tape of Malcolm's conversations with Masson. The following conversation, however, does appear on tape:

> MASSON: [Had Freud been honest about the Schreber case, he would have said] I have here in my library an article by Paul Flechsig, in which he recommends castration. Now, you may wonder whether this had anything to do with . . . Schreber's delusions. My answer is: It did not.
>
> MALCOLM: Uh huh.

> MASSON: And it leaves the reader the opportunity to think about it by providing evidence he knew to be germane to the issue, but Freud doesn't do that. . . . I even wrote in my Schreber paper when I—the one that I met with Eissler over, I said, "I cannot believe that Freud knew the works of . . . [Schreber's] father. I simply do not believe he knew them because if he did, he wouldn't be able theoretically to ignore this and —
>
> MALCOLM: Yeah.
>
> MASSON: Now, I know that's not true.
>
> MALCOLM: So what did Eissler say then?
>
> MASSON: He agrees with me, of course.

The latter portion of this passage is ambiguous. It is difficult to discern whether Masson is claiming that Eissler "agrees" with Masson's current belief that Freud knew that Flechsig performed castrations at the time he published his case study, or that Eissler "agrees" with the statement that Freud did not "know the works of the father" contained in Masson's paper on Schreber which was written prior to the discovery of Fleschsig's article among Freud's papers."

The words ascribed to Masson that "Eissler would have admitted that I was right" were a rational interpretation of Masson's ambiguous remarks about Eissler's reaction to his discoveries about the Schreber case. The district court did not err in granting summary judgment to Malcolm concerning the quoted language.

h. "Denise Worries Too Much"

Malcolm quoted Masson's girlfriend Denise Cammell as complaining that Masson did not "feel the pain" that he had caused Dr. Eissler. Malcolm quotes Masson as responding, "Denise worries too much." Masson contends that Malcolm fabricated this response. The tape shows that Masson responded to Denise's complaint about his lack of feelings for Eissler by stating that he was not personally "close" to Eissler.

The district court held Masson failed to present "clear and convincing evidence that Malcolm entertained serious doubts about the truth" of the allegedly fictionalized response. The response Masson made to Denise's complaint, that he was not "close" to Eissler, can reasonably be read as non-responsive. The comment did not respond to Malcolm's statement regarding Denise's specific complaint about Masson's lack of feelings. Moreover, Masson admits that he told Malcolm that his girlfriend worried too much. Thus, the purported fictionalization "Denise worries too much" did not constitute a substantive alteration of the response Masson claims he made.

B. "Misleadingly Edited" Quotations

1. Applicable Principle

[5] Masson contends that Malcolm took several statements out of context. He contends that a reasonable jury could find actual malice on Malcolm's part solely upon the evidence he presented showing that the article was edited misleadingly.

The Supreme Court has provided guidelines to assist courts in determining when actual malice may be inferred from

evidence showing misleading editing. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the defendant magazine published an account of a report by the United States Civil Rights Commission. The Civil Rights Commission's report detailed "the alleged facts in typical cases of police brutality," under a the preface providing that while "[i]n no case has the Commission determined conclusively whether [police brutality occurred] . . . the allegations appeared substantial enough to justify discussion." *Id.* at 287. One of the cases of brutality the report described was the "alleged" racially-motivated beating of an arrestee by a Chicago police officer named Pape. *Id.* at 281.

In its article about police brutality, the magazine set forth detailed description of the beating inflicted upon the arrestee by Officer Pape. The magazine article failed to mention, however, that the Civil Rights Commission had prefaced its description of this beating with the proviso that it was describing mere allegations of police brutality. *Id.* at 281-82.

[6] Pape sued claiming, inter alia, that actual malice on the part of the magazine could be inferred from its omission of the word "alleged" in the article. The Supreme Court disagreed. The Court held that the Civil Rights Commission's prefatory remarks about "allegations" "may fairly be characterized as extravagantly ambiguous." *Id.* at 287. "[I]n context it was impossible to know whether the Commission was seeking to encourage belief or skepticism regarding the incidents about to be described." *Id*, at 288. In light of this ambiguity, the Court held:

> [The magazine's] omission of the word "alleged" amounted to the adoption of one of a number of possible

> rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice . . . .To permit the malice issue to go to the jury because of the omission of a work [sic] like "alleged," despite the context of that word in the Commission Report . . . , would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

Id. at 290.

[7] We next consider whether, in light of the test set forth in *Time, Inc. v. Pape*, actual malice can be inferred from the passages which Masson contends were edited in a misleading manner.

2. The Challenged Quotations

a. "Aren't Too Many Interpretations Possible"

Malcolm quotes Masson as stating that "[t]here aren't too many interpretations possible" of his discovery that Freud had knowledge that Flechsig performed castrations prior to the publication of the case study on Schreber. Masson complains that Malcolm took this statement out of context. He contends that he made this statement with reference to discoveries he had made showing that Freud abandoned the "seduction" theory for improper reasons.

Masson's "interpretations" comment appears in the following portion of the transcript of the taped interviews:

> MALCOLM: [Eissler seemed to believe Freud's abandonment of] the seduction theory was, was correct. . . .
>
> MASSON: Yeah but if, I mean if he had let me talk to him long enough about all the new material, he would've had to share more or less my point of view.
>
> MALCOLM: Um-hmm. You really think so?
>
> MASSON: Oh yeah.
>
> . . . .
>
> MASSON: But it, yeah, but *I don't think there are too many interpretations possible* of this kind of material You know it's just overwhelming the amount of, of information that's been suppressed and so on . . . .
>
> MALCOLM: Yeah, I see.
>
> MASSON: You know and I think Eissler would have admitted that. I think if I had said to him: "Look, you know, I'm not going to ever say this, but just between you and me —," he would've said, "Yes, you're right, but never, never tell the goyim."

(emphasis added).

The district court held that "in light of the somewhat confusing references to 'discoveries' and 'new material' in the transcript, . . . [Masson's] statements . . . could reasonably be

seen as pertaining, at least in part, to . . . [Masson's] discovery about the Flechsig article." The district court held that "[t]he published passage was a rational interpretation" of Masson's taped comments. We have reached the same conclusion after our independent review of the taped conversation. It is unclear from the 'interpretations" passage whether Masson's [sic] was referring to his discoveries about Freud's possession of Flechsig's article, or other discoveries by Masson that supported his belief that Freud improperly abandoned the seduction theory. Malcolm's interpretation of Masson's comment was rational.

b. "He Had The Wrong Man"

Malcolm quoted Masson as stating:

> [Eissler] . . . was always putting moral pressure on me [to keep silent about my discoveries about Freud]. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? You're doing it. You're firing me. What am I supposed to do, be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.

Masson's unedited remarks on the tape were as follows:

> [Eissler] . . . was constantly putting various kinds of moral pressure on me, and, "Do you want to poison

> Anna Freud's last days" Have you no heart?" He called me up, "Have you no heart? Think of what she's done for you, and you are now willing to do this to her." I said, "What am I, What have I done? You're doing it, you're firing me. What am I supposed to do, thank you? Be grateful to you?" He said, "Well, you could never talk about it, you could be silent about it, you could swallow it. I know it's painful for you, but just live with it in silence." "Fuck you," I said "Why should I do that Why? You know, why should one do that?" Because it's the honorable thing to do, *and you will save face, and who knows, if you never speak about it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?"* Well, he had the wrong man.

(emphasis added).

Masson contends that Malcolm purposefully deleted the portion emphasized above to make it appear that he admitted that he "was the wrong man" to ask to do something honorable. He contends that the unedited passage reveals that he said only that he was the wrong man to keep silent for selfish reasons — to keep his future job prospects open.

Masson's statement that he "was the wrong man" is ambiguous. It is unclear whether he was declaring that he was the "wrong man" to keep silent for selfish purposes, or the "wrong man" to ask to do something honorable. The statement Malcolm ascribed to Masson was a rational interpretation of his ambiguous remarks.

IV.

[8] Masson contends that The New Yorker and Knopf are vicariously liable for Malcolm's actions in allegedly libeling him and placing him in a false light. Because we have concluded that Masson failed to present evidence sufficient to support a reasonable jury finding that Malcolm acted maliciously, the district court did not err in holding that The New Yorker and Knopf cannot be held liable for publishing the article and book.

V.

The defendants contended in the district court that Masson's complaint, and his opposition to their summary judgment motion, lacked a reasonable basis in both fact and law. They moved for attorneys fees and costs under Fed. R. Civ. P. 11 and Cal. Code Civ. P. § 1021.7 (West Supp. 1988). Rule 11 provides that "the signature of an attorney or party [on a pleading, motion or other paper] constitutes a certificate by him . . . that it is well grounded in fact and is warranted by existing law . . . ." Cal. Code Civ. P. § 1021.7 provides that "in an action for libel or slander . . . , the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause."

The district court did not issue explicit findings on the defendants' requests for costs and attorneys fees under Rule 11 and section 1021.7. The court simply ruled that "each side to bear their own attorney's fees and costs." In their cross-appellants' brief, the defendants contend that this court should

remand this claim to the district court with directions that it make findings on their request for attorneys fees and costs.

This court has apparently not yet decided whether district courts must make explicit findings on a defendant's request for costs and attorneys fees under Rule 11. This issue, however, has been specifically addressed by the Fifth and Seventh and Tenth Circuits. The Fifth Circuit holds that findings are not required. *See Thomas v. Capital Security Serv.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc). The Seventh Circuit holds that findings are required unless "the motion for sanctions is foolish, or when the reasons for denying a colorable motion are apparent on the record." *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. dismissed*, __ U.S. __, 108 S. Ct. 1101 (1988); *see Brown v. Federation of State Medical Boards of the United States*, 830 F.2d 1429, 1438 (7th Cir. 1987). The Tenth Circuit mandates findings where the sanction award has the effect of a preclusion of access to the courts. *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986).

Neither this court, nor the California courts, have decided the specific question whether trial courts must make explicit findings on requests for attorneys fees under section 1021.7. However, this court has held that district courts must make findings on requests for attorney fees under Cal. Civ. Proc. Code §1021.4, an attorney fees statute related to section 1021.7, in diversity actions arising under California law. *Insurance Corp. of North America v. Moore*, 783 F.2d 1326, 1328 (9th Cir. 1986).

We need not decide whether the district court must make explicit findings in response to a motion under Rule 11 and section 1021.7. It is uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson. Given these

uncontroverted facts, the only relevant question with respect to the Rule 11 and section 1021.7 motions is one of law: Could "a plausible, good faith argument . . . be made by a competent attorney" that actual malice could be inferred from the evidence Masson presented showing that the quotes were fictionalized. *Zaldivar v. Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986). This legal issue can be decided by this court. *Cf. Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987) ("[i]f the legal conclusions of the district court that the facts constitute a violation of . . . Rule [11] is disputed, we review that legal conclusion *de novo*").

We believe Masson made a plausible, good faith argument that actual malice could be inferred from the evidence he presented demonstrating that quotations were fictionalized in the article. At the time of the filing of the complaint, the law in California and in this circuit was unclear whether actual malice can be inferred solely from proof that an author by using quotation marks ascribed to the plaintiff words that he did not speak. The district court did not err in refusing the defendant's request for attorneys fees and costs under Rule 11 and section 1021.7.

The defendant's request for sanctions is denied. Masson's post argument suggestion that we consider material not presented to the district court is denied.

The district court's order granting summary judgment to New Yorker is AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

The majority and I part company on a simple but fundamental point: the meaning of quotations. As I see it, when a writer uses quotation marks in reporting what someone

else has said, she is representing that those are the speaker's own words or something very close to them. The majority views quotations much more amorphously: They are merely an extrapolation of the speaker's words, as interpreted in light of his background and character. Under the majority's approach, the resulting "quotation" may differ significantly in wording and content from what the speaker actually uttered, so long as the writer can argue with a straight face that it is a rational interpretation of what the speaker said. If the speaker is thereby made to sound stupid or arrogant, evil or insincere, the majority denies him a remedy.

While courts have a grave responsibility under the first amendment to safeguard freedom of the press, the right to

deliberately alter quotations[1] is not, in my view, a concomitant of a free press. Neither the authorities on which the majority relies nor the applicable first amendment principles suggest otherwise. I must therefore respectfully dissent.

I

A. This is a case of libel. Plaintiff Jeffrey M. Masson gave an extended interview to defendant Janet Malcolm, who was writing a story about Masson's stormy relationship with the Sigmund Freud Archives. All or substantial portions of that interview were tape-recorded. Masson now claims that Malcolm attributed to him a number of statements he never made and materially changed others so as to place him in a false and unfavorable light. He supports his claim with a detailed and articulate declaration; he also provides transcripts of the tapes and other collateral evidence, all of which seem to corroborate his claim.

There are, to be sure, many disputed facts: Malcolm claims that Masson made the statements in question precisely as she quoted them, albeit during interview sessions that were not tape-recorded. But, as the majority recognizes, the dispute must be resolved in Masson's favor in this appeal from a grant of summary judgment. We therefore start with the assumption that Malcolm altered Masson's statements as he claims she did.

[1]This is not hyperbole. The majority articulates its premise explicitly: "For the purpose of this appeal, we assume the quotations were deliberately altered." Majority op. at A-5.

Under the law of California, which we are bound to apply in this diversity case, attributing to Masson a statement he did not make can constitute libel. *See Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 1129, 212 Cal. Rptr. 838, 844 (1985). Indeed, in *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986), on which the majority relies, the court sustained a libel verdict based in part on misquotations, even though the story purported to be fictional and the dialogue was nominally attributed to a character bearing a name different from the plaintiff's.

Nor is there any dispute as to the plaintiff's burden of proof. Masson readily concedes he is a public figure who must prove malice under *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964). This means that Masson cannot recover for inadvertent, careless or even negligent alterations of his quotes. He can only recover if he shows that defendants deliberately changed his words or misquoted him recklessly. *Id.* at 279-80. Masson claims he can do this; he asks for the opportunity to present his proof to a jury.

The majority holds, as a matter law, that Masson cannot establish malice as to some of the challenged quotations because they did not alter the substance of his statements and, as to others, because they were rational interpretations of Masson's own ambiguous remarks. Majority op. at A-10-11. While both parts of this test are troublesome, the second is particularly so. An unqualified quotation attributed to a third party is commonly understood to contain *no* interpretation; by using quotation marks the writer warrants that she has interposed no editorial comment, has resolved no ambiguities,

has added or detracted nothing of substance. As more fully discussed below, *see* pp. A-57-69 *infra*, that is the prevailing view among journalists. It is also, I believe, the assumption made by most readers. Because quotations purport to come directly from the speaker — free of editorial comment by the writer — they can have a devastating rhetorical impact and thus carry a serious potential for harm.

We need not speculate; the record contains clear evidence on the subject. For example, a review of Malcolm's article in the *Boston Globe* by psychiatrist Robert Coles, a Harvard professor, contains the following appraisal of Masson, based on Malcolm's work:

> Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist — mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. *But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile*— a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.

Coles, *Freudanism and Its Malcontents*, Boston Globe, May 27, 1984, at 58, 60 (emphasis added). And again, in a review of Masson's own book, reference is made to Malcolm's description of him, and particularly to the words he supposedly uttered:

> . . . Malcolm's portrait of Masson is devastating: *largely through his own words* he emerges as a feverish jumble of vanity, self-destruction, childishness, and ruthlessness.

Kirkus Reviews, Apr. 1, 1984, at 345 (emphasis added).

As these reviews indicate, and as common sense suggests, readers give far greater weight to direct quotations than to descriptions or paraphrases by the author. This is because quotations allow readers to draw their own conclusions about the speaker's character, motive, candor and lucidity.[2] Experienced writers are well aware of this phenomenon and frequently use quotations as proof — raw data to enhance the credibility of the narrative — as if to say: "See here, don't just take my word for it, he said it himself." An article devoid of such factual anchors, one that consists entirely of the author's own observations and conclusions, will generally leave readers dissatisfied and unpersuaded, as well as bored.

Because quotations possess an immediacy and resulting credibility often lacking in ordinary narrative prose, minor changes in quoted language can have a major effect on how a speaker is perceived. A skilled writer can shade a speaker's words in subtle ways that will color a reader's perception far more effectively and permanently than if the writer paraphrases or otherwise discloses her editorial role. For example, if Malcolm tells us "Masson thinks he is the greatest analyst who

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[2] A somewhat dated journalistic manual makes the point clearly:

> The direct quotation of a man's remark or his exact statement is always more effective than a summary or an indirect quotation. Editorial writers use quotation marks frequently to increase the force of their statements.

G.M. Hyde, *A Course in Journalistic Writing* 240 (1922).

ever lived, " we discount the statement somewhat, aware that it represents merely her own conclusion, filtered through her perception, biases and mode of expression. It is quite a different matter to read Masson as saying "I am the greatest analyst who ever lived." This shows him to be not only arrogant and conceited, but a braggart to boot. By putting the phrase into Masson's own mouth and concealing her role as interpreter and editor, Malcolm has caused Masson a serious injury and made it look like a self-inflicted wound. It is this concealment — the use of quotation marks to deceive the reader about the author's editorial role — that libel law prohibits and the Constitution does not, in my opinion, protect.

A close examination of this particular discrepancy, among a dozen or so of which Masson complains, shows the insidious way in which Malcolm is alleged to have manipulated Masson's words to place him in an unfavorable light. Malcolm quotes Masson as saying, "They [analysts] will want me back, they will say that Masson is a great scholar, a major analyst — after Freud, he's the greatest analyst who ever lived." Malcolm, *Annals of Scholarship: Trouble in the Archives — II*, The New Yorker, Dec. 12, 1983 (Malcolm II), at 60, 118. Anyone reading this self-appraisal would be hard pressed to avoid the conclusion that Masson is an egomaniac.

Masson denies making this statement and, for purposes of summary judgment, we must assume he never did. The district court nevertheless held that "[i]n light of the many egotistical and boastful statements that Masson made in tape-recorded comments . . . plaintiff has not demonstrated clear and convincing evidence from which a reasonable jury could conclude that Malcolm entertained serious doubts about the accuracy of the passage." Majority op. at A-18. The majority

agrees, noting that "[t]he purportedly fictionalized quotation actually reflects the substance of Masson's self-appraisal." *Id.* at A-18. This rationale is explosive. What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.

The enormous sweep of this principle can best be appreciated by comparing what Masson actually said with what Malcolm attributed to him. Masson's statements are materially different both in tone and content from what Malcolm reports him to have said; they are hardly the ravings of a lunatic. The majority, for example, relies on Masson's statement that "for better or for worse, analysis stand or falls with me now." *Id.* at A-18. Plucked out of context, this statement sounds like an egotistical self-appraisal of Masson's pivotal status in the profession. Context, however, makes it clear that Masson was not describing his own abilities but the materials he claims to have discovered. Indeed, when Malcolm challenged him by saying "Well that's a very grandiose thing to say, " Masson responded, "Yeah, *but it's got nothing to do with me*. It's got to do with the things I discovered." Excerpt of Record (ER) at 128 (emphasis added). For Malcolm to have truncated Masson's actual statement and quoted it out of context ("analysis stands or falls with me now") would itself

have violated professional standards.[3] But using this and other snatches as yarn from which to weave a wholly different statement to be passed off as a quote from Masson is a power few self-respecting journalists arrogate to themselves. *See* pp. A-57-69 *infra*.

The majority also relies on Masson's statement that "it's me and Freud against the rest of the analytic world . . . . Not so, it's me. It's me alone." Supplemental Excerpt of Record (SER) at 38-39. Again, freed from context, this snippet seems to support the majority's conclusion that Masson thought himself the greatest analyst who ever lived. But context gives the statement a far different cast. Immediately before this paragraph, Masson says, "Talk to enough analysts and get them right down to those *concrete issues* and you watch how different it is from *my position*. It's utterly the opposite and that's finally what I realized, that *I hold a position* that no other analyst holds, including, alas, Freud." *Id.* at 38 (emphasis added). When read against this background, Masson's next statement, that "it's me and Freud against the rest of the analytic world . . . . Not so, it's me. It's me alone, " sounds

[3] John L. Hulteng, a veteran reporter and now Dean of the School of Journalism at the University of Oregon, makes this point clearly:

> The impression created by a quotation can be as important as the literal accuracy of that quotation, and thus placement and context become elements of reality so far as the perception of the quote may be concerned. So when a reporter — or the writer of a book, for that matter — undertakes to "rejigger" someone else's ideas or observations he lies under a strong ethical obligation to be sure that he has not tampered with the essential reality of the material.
>
> Editing copy is just as consequential an act of journalistic gatekeeping as reportorial selection of detail or choice of quote fragments.

J.L. Hulteng, *The Messenger's Motives: Ethical Problems of the News Media* 74 (1976).

much less narcissistic: It's clear he's not talking about his pre-eminence in the profession, but about the fact that *his position* on a particular issue is shared by no one else. True, there is a healthy element of boasting in Masson's statement; people often take pride in holding unpopular positions. But that is a far cry from asserting that others will see him as "the greatest analyst who ever lived." At least, I respectfully submit, a jury could reasonably conclude that the two are materially different.[4]

Another example of how broadly the majority's rationale sweeps is its willingness to approve Malcolm's use of the loaded phrase "intellectual gigolo," majority op. at A-12-16, when Masson denies having so described himself. Like "greatest analyst who ever lived,""intellectual gigolo" is particularly damning because of its graphic imagery and the emotional impact it is likely to have on the reader. The majority is willing to say close enough, principally on the basis of Masson's statement that Kurt Eissler and Anna Freud viewed him as

> a private asset but a public liability. They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that *I was*, in a sense, *much too junior within the hierarchy of analysis*, for these important training analysts to be caught dead with me.

[4] The same is true of the final statement the majority relies on, namely "[I] could single-handedly bring down the business of [Freudian psychology]." Majority op. at A-18. Masson was plainly puffing the significance of his discoveries, not claiming to be the intellectual Atlas of the profession.

ER at 66 (emphasis added). The majority concludes that intellectual gigolo is a rational interpretation of these comments because "[t]he descriptive term 'intellectual gigolo,' as used in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler." Majority op. at A-14 (internal quotations omitted).

To reach this conclusion, the majority must give Malcolm the benefit of every doubt. In the first place, the majority accepts that most benign interpretation of gigolo, "a professional dancing partner or male escort." *Webster's Ninth New Collegiate Dictionary* 517 (1984) (definition 2). But a far more common definition of gigolo is "a man supported by a woman usu. in return for his attentions," *id.* (definition 1), or "[a] young man who is kept as a lover by a woman." *American Heritage Dictionary of the English Language* 556 (New College ed. 1969)(only definition).[5] Malcolm herself, during a deposition, testified that she construed gigolo as connoting "selling your sexual favors." SER at 61.

Fairly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain. Certainly, a jury might so conclude. For an academic to refer to himself as an intellectual gigolo is such a devastating admission of professional dishonesty that a jury could well conclude that it is libelous. I can see no justification for giving this emotionally loaded term the most innocuous conceivable interpretation, an interpretation contrary to the one

[5] *American Gigolo*, a movie about a male prostitute, exemplifies the pejorative connotation the term gigolo has gained in our society.

in fact intended by the author.[6]

Even accepting the majority's bland definition of "intellectual gigolo," I fail to see how the term can fairly be derived from Masson's actual statement. In the quoted passage, Masson discusses Eissler's and Anna Freud's attitude toward him; apparently they liked him personally but they thought him "too junior within the hierarchy of analysis" for them to be publicly associated with him. Being too

[6] In a curious about-face, the majority concedes that gigolo might be subject to a less wholesome interpretation, but justifies its use by reference to others of Masson's comments that the majority construes as "sexual metaphors." Majority op. at A-14 n.4. The cited passages provide scant support for the majority's conclusion; just as it adopted an idiosyncratically puritanical definition of gigolo, the majority must strain to attribute a salacious meaning to Masson's words. Thus, Masson's reference to "[s]uck stories" and his discussion of who, among young analysts, "can suck the most," has only the most remote connection with sex. As I understand common parlance, sucking up is an expression similar to kissing up or buttering up, meaning to flatter or curry favor with someone. *See New Dictionary of American Slang* 422 (R.L. Chapman ed. 1986). I cannot agree with the majority that Masson's reference to "[s]uck stories" would inevitably lead a jury to conclude that "Masson conceptualized his relationship with Eissler and Freud . . . as an intimate, mysterious, and perhaps surreptitious diversion — not unlike that of a 'gigolo.'" Majority op. at A-14 n.4.

The dramatically different interpretations the majority and I give to this passage illustrate the volatile nature of the test the majority adopts. Under the majority rationale, Malcolm would have been justified in quoting Masson as saying "I often had oral sex with Eissler," that, after all, being a rational interpretation of the expression suck up as the majority understands it.

In any event, the majority's detour misses the point entirely. Masson is not complaining that he was painted as an *actual* gigolo; he complains about being called an *intellectual* gigolo, i.e. someone who would sell out intellectually to advance his career. Accepting at face value the majority's view that Masson viewed his relationship with Eissler and Freud as "intimate, mysterious, and perhaps surreptitious," how does that even slightly support the proposition that Masson thought himself an intellectual prostitute?

junior to be taken seriously is quite different from being a public embarrassment; one suggests that Masson is a young man with potential, the other makes him out to be a clown.[7]

Yet another abuse condoned by the majority's analysis concerns the passage attributing to Masson the statement that,

[7]The majority pulls yet another arrow from its quiver, suggesting that Masson did not carry his burden of proving that he never called himself an intellectual gigolo because his "only proof that he never said such a thing is his simple, albeit vehement, denial." Majority op. at A-14 n.4. "This showing," the majority concludes, "is simply insufficient to pass muster under the applicable standard of proof." *Id.*

My distinguished colleagues err twice. In the first place, they do not explain, and provide no citation for, the proposition that a party's sworn statement as to what was said during a two-party conversation is insufficient to create a triable issue of fact as to the contents of that conversation. Under normal circumstances, after all, there *is* no proof other than the parties' own conflicting allegations. The majority thus seems to create a new rule of libel law: In a swearing contest between reporter and subject, the reporter always wins.

Equally troublesome is the majority's assertion that Masson has advanced nothing but his own word to contradict Malcolm's assertion that he called himself an intellectual gigolo. In fact, Masson has advanced much more than that:

(1) While Malcolm tape-recorded most of what Masson said, she now claims that some of Masson's most damaging statements — including his use of the term intellectual gigolo — were made during a conversation that was not recorded. Masson claims that he never made such a statement. The jury might infer from the absence of a tape recording that Malcolm fabricated the remark.

(2) Malcolm represented to her editor, and later in a letter to the *New York Times*, that every quote from Masson was on tape, *See* p. A-81 infra. The jury might view this now repudiated assertion as an oversight, or it might conclude that Malcolm was telling the truth then and that she fabricated her more recent claim that some conversations were not taped.

(3) Malcolm claims she made handwritten notes of the untaped conversation, but those notes have been destroyed; all we have is Malcolm's typewritten transcription of the notes. The jury could conclude that (a) Malcolm fabricated a transcription of a nonexistent conversation; (b) there was a conversation but Malcolm failed to take contemporaneous notes and the transcription reflects her faulty recollection of what was said; or (c) Malcolm took notes but recklessly or

had he been allowed to move into Anna Freud's house in London, he would have made it "a place of sex, women, fun." Malcolm, *Annals of Scholarship: Trouble in the Archives—I*, The New Yorker, Dec. 5, 1983 (Malcolm I), at 59, 93. The majority justifies Malcolm's fabrication of this pat little phrase by quoting Masson's statements that "[t]hey're going to be calling the police on me every, every time I give a party or something," and that "I could have had some fun." Majority op. at A-17. These references support only use of the word "fun"; to justify the "sex" and "women," the majority digs far into Masson's past, noting that he had "boasted [to Malcolm] of his sexual prowess," and had "told Malcolm that he hadslept with over 1,000 women *before he became an analyst.*" *Id.* A-18 (emphasis added).

The majority's reliance on this remote and inapposite remark, made by Masson during the course of an entirely

deliberately altered them during the transcription. The permutations are many and none are inherently implausible.

(4) In her story, Malcolm describes in minute and lively detail the conversation during which Masson referred to himself as an intellectual gigolo. According to the story, the statement was made while she and Masson were having lunch at Chez Panisse in Berkeley. Malcolm now admits that the statement was made at a different time and place, while Masson was visiting her in New York. The jury might believe Malcolm when she explains that Chez Panisse was merely a literary backdrop, but it might also conclude that having fabricated one aspect of the conversation she would be capable of doing so twice.

(5) There is direct evidence that Malcolm doctored other quotes to make them more bombastic. *See* pp. A-80-81 *infra*. The jury might infer that Malcolm was not above inventing quotations in order to get her point across.

Even if Masson's statement were not enough to create an issue of fact as to what he said to Malcolm, surely these additional circumstances are sufficient to entitle Masson to a jury trial as to whether or not he called himself an intellectual gigolo.

unrelated conversation, demonstrates just how far afield a journalist may roam under the "rational interpretation" approach. To be sure, if one digs through the over one thousand pages of interview transcript, one occasionally finds the word sex; specifically, Masson did discuss his exploits as a young man, albeit with some remorse.[8] But what does that prove? In effect, the majority is saying that, because of his wayward youth, Masson is the kind of guy who probably *would* use the Freud house for "sex, women, fun," and therefore Malcolm was entitled to make him say so to the world. I respectfully suggest that if authors are given license to invent quotations on the basis of what they perceive to be a speaker's character, there are no words whatsoever that they cannot put into a subject's mouth. As more fully discussed below, *see* pp. A-57-69 *infra*, that practice is roundly denounced by most journalists: "It is never justifiable for a journalist to make up quotations, however plausible or characteristic . . . ." J.L. Hulteng, *Playing it Straight: A Practical Discussion of the Ethical Principles of the American Society of Newspaper Editors* 64 (1981).

Yet another abuse sanctioned by the majority is the passage which ends with the sentence "Well, he had the wrong man." *See* majority op. at A-28-29. Because the passage appears in the taped transcripts, we have a road map as to what Malcolmdid: She deleted 33 words out of a 40-word sentence, utterly changing Masson's meaning so as to make him say the antithesis of what he actually said. In this passage, Masson reports a conversation with Eissler in which Eissler asks him

[8]Masson described his promiscuity as neurotic behavior for which he sought treatment. Transcript of the Masson/Malcolm Tapes, vol. 1, part 1, at M243-45.

to leave quietly. Masson asks the rhetorical question: "Why should I do that? Why? You know, why should one do that?" In the article, Malcolm has Masson responding to this question as follows: "'Because it is the honorable thing to do.' Well, he had the wrong man." The meaning of this exchange is clear: Masson is supposedly saying that Eissler had the wrong man if he expected Masson to do something honorable. Masson's *actual* answer (with the deleted words emphasized) was quite a bit more elaborate:"'Because it's the honorable thing to do, *and you will save face, and who knows, if you never speak about it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?'* Well, he had the wrong man." Masson was clearly saying that he is the wrong man to be bribed into silence by the hope that they would bring him back a few years later.

The contrast between the two statements could not be sharper. As reported by Malcolm, Masson portrays himself as a swine, boasting that he would never be swayed to do the right and honorable thing. Masson's unedited statement makes him sound more like a hero, someone willing to speak the unpleasant truth even if it damages his career. As more fully discussed below, the selective editing of quotations so as to radically alter their meaning is anathema among respectable journalists. *See* pp. A-57-69 *infra*. The majority's willingness to approve Malcolm's alteration on the ground that she could reasonably have understood Masson to be calling himself a swine demonstrates that the majority's rationale has no meaningful bounds.

The examples I have given are illustrative; each of the other quotations of which Masson complains are also distorted to a

greater or lesser extent.[9] In each case Malcolm has allegedly disregarded what Masson actually said, and substituted another phrase or series of phrases — frequently with the

[9]The majority's analysis of the phrase "Eissler would have admitted I was right" is particularly instructive. Majority op. at A-22-23. The majority quotes a lengthy passage where Masson says that Eissler "agrees with me, of course;" the majority then notes that the reference for Masson's statement is ambiguous: " It is difficult to discern" what Eissler was agreeing with Masson about. The court nevertheless approves Malcolm's decision to attribute to Masson the statement "Eissler would have admitted I was right," because the quoted passage can be rationally interpreted as saying so. What if Masson was *not* saying so, a possibility the majority seems to admit is equally plausible? In that event, Masson is left with claiming something he in fact never said.

I have no quarrel with the proposition that if Masson said something ambiguous, Malcolm was entitled to select the interpretation she preferred and attribute it to Masson *in her own words*. But surely there is no justification for doctoring Masson's statement to remove the ambiguity and then pretending that Masson actually uttered it. The gist of the majority's analysis is that even if the author is wrong in guessing the speaker's meaning, her choice will be respected; the speaker's protestations that he in fact said the opposite, and that, if his statement had been preserved, some of the readers would have understood him, counts for nothing. In the marketplace of ideas this gives the author an unjustified monopoly.

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skilled hand of the experienced author[10] — to paint an image materially different from what Masson's own words would have conveyed. Cumulatively, these alleged fabrications fit into a pattern that makes Masson appear more arrogant, less sensitive, shallower, more self-aggrandizing, and less in touch with reality than he appears from his own statements. While Malcolm was entitled to draw such inferences on the basis of her interview and to so describe Masson, she was not entitled to manufacture support for her conclusion by putting words in his mouth. By so doing, she crossed the line between poetic license and license. The latter the first amendment does not protect.

B. The majority distills its legal standard from a series of cases, none of which supports its position. *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3rd Cir. 1987), which is the most analogous, involved a Spanish-language newspaper's story on the mayor's speech, delivered in English, about the problem of litter in minority communities. The newspaper's headline asserted that the mayor had used the term "cerdos," a word that means "pigs," in referring to Hispanics. The court found that "cerdos" was also a fair translation of litterbugs, a word with no exact Spanish equivalent. In ruling for the defendant, the Third Circuit noted that "a translation may not always reflect the nuances and subtleties of the original language. This is especially true in

[10] Whatever one may think about the merits of this case, there is no doubt that Janet Malcolm is an exceptionally talented writer. *See, e.g.*, Malcolm, *Books: Pink Roses*, The New Yorker, June 26, 1989, at 89; Malcolm, *Reflections: The Journalist and the Murderer*, The New Yorker, Mar. 13, 1989, at 38 (part 1), Mar. 20, 1989, at 49 (part 2).

the present case, because it is not controverted that there is no exact Spanish word for litterer or litterbug." *Id.* at 452. Even then, the Third Circuit did not hold, as the majority does here, that the plaintiff could never prove malice; it merely held that, in light of the difficulties inherent in translation, "it was critical to the plaintiff's case that he meet this reality with countervailing factual evidence of actual malice. This he failed to do. In failing, he created no genuine issue of material fact." *Id.*

Judge Aldisert's carefully crafted opinion in *Dunn* provides scant support for the majority's conclusion in our case. The problems inherent in translating from one language to another don't exist when everyone is speaking English. Translation necessarily involves a judgment: The translator must select the foreign-language word that best corresponds to the English word the subject actually uttered; even more discretion is called for when no precise translation is possible. But no judgment is required in quoting an English-speaking person in English.

Insofar as *Dunn* is relevant, it supports Masson. Even in the peculiar situation involving the translation of a term that had no Spanish equivalent— a situation where the newspaper could not avoid exercising judgment— the Third Circuit allowed for the possibility that malice could be established by collateral evidence; it held only that malice could not be inferred from use of the term "cerdos" alone. Because "cerdos" was a fair translation of litterbugs, "it was critical to the plaintiff's case that he meet this reality with countervailing factual evidence of actual malice." *Id.* Plaintiff lost because he failed to present such additional evidence.

Here, there is a mountain of "countervailing factual evidence" tending to show malice: assurances Malcolm allegedly gave Masson that all quotes would be verbatim; the existence of tape recordings for many of the conversations; that Masson advised *The New Yorker's* fact-checkers that he was being misquoted; evidence that at least one of the quotations was changed, apparently in Malcolm's handwriting, to make it more bombastic but less accurate. *See* pp. A-80-81 *infra*. Such evidence, absent in *Dunn*, could easily support a jury's determination that the alterations in Masson's quotations were deliberate or reckless, not merely careless, accidental or negligent.

Even less helpful to the majority than *Dunn* is the Second Circuit's opinion in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d. Cir.), *cert. denied*, 434 U.S. 834 (1977). *Hotchner* involved Castillo-Puche's memoir of his days with Ernest Hemingway. Plaintiff raised several claims of libel, one of which centered around a statement, attributed to Hemingway, that was graphically derogatory of the plaintiff. The court held that Doubleday & Co., which published the English translation of the book in question, could not be held liable because the "incident itself is believable and, as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway." 551 F.2d at 914. Doubleday's editor verified the statement as best she could, asking the author (who claimed to have overheard the statements) to confirm his recollection of it. *Id.* Under those circumstances, the court held, there could be no malice. The court's rationale is instructive: "Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth." *Id.*

As an afterthought, *Hotchner* noted that Doubleday had fictionalized the passage somewhat by deleting the most graphic and stinging of Hemingway's remarks and replacing them with the bland "I don't trust him."[11] The court rejected the argument that this change in the language of the quotation could serve as a basis for a libel verdict: "[T]he change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about Hotchner. *If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner." Id.* (emphasis added).

I cannot, as the majority apparently does, read this passage for the proposition that a writer may alter quotes so as to make them defamatory and then attribute them to a third party with impunity. The Second Circuit held only that plaintiff could not base a claim on the changes in the Hemingway quote because the changes "did not increase the defamatory impact" of the quote. In relying on *Hotchner*, the majority makes far too much out of far too little.

Hotchner, however, *is* relevant and, like *Dunn*, helps Masson. It provides a fair and reasonable standard for evaluating a publisher's responsibility for defamatory quotations. As noted, the court held that Doubleday could not have been reckless as to the accuracy of the passage in question because (1) the incident was believable; (2) the passage sounded like Hemingway; (3) there were no convincing indicia of unreliability; and (4) the passage was

[11] As reported by Castillo-Puche, Hemingway's actual words were: "[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." 551 F.2d at 914.

incapable of independent verification. As more fully discussed below, the third and fourth of these factors cut very sharply against the defendants in this case. *See* pp. A-80-88 *infra*. With tapes in hand and fact-checkers alerted to Masson's protestations that he had been misquoted, defendants had the means for verifying the accuracy of the quotations and the "convincing indicia of unreliability" that should have prompted them to do so. Applying *Hotchner* to this case leads precisely to the opposite conclusion from that reached by the majority.

The majority also relies on the Seventh Circuit's opinion in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), but as I read *Carson*, it is more accurately described as conflicting with today's ruling. Judge Sprecher's stern admonition to journalists ("In the catalogue of responsibilities of journalists, right next to plagiarism . . . must be a canon that a journalist does not invent quotations and attribute them to actual persons," *id.* at 213) stands in stark contrast to the majority's benediction of the practice of fabricating and doctoring quotes. Malcolm here has admitted that a conversation she reported as having had with Masson did not occur at the time or place she indicated in her article. *See* Clerk's Record (CR) 95 at paragraphs 14, 15. Masson, in turn, claims that he never made the statements attributed to him during that mythical conversation. If *Carson* does not cover a situation where the journalist invents a conversation that never took place and reports words that the subject never uttered, I am not sure exactly what it does cover. As with *Dunn* and *Hotchner*, the majority avoids a circuit conflict only by drawing minute distinctions not supported by the rationale of the opinion or the facts of the case. Despite the majority's attempt to close ranks with our sister circuits, today's decision

stands in conflict with that of every other circuit that has addressed the issue.

The majority also places oblique reliance on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971), principally for the proposition that "malice may not be inferred from inaccurate language chosen to describe an event where the description is "'one of a number of possible rational interpretations" of an event "that bristled with ambiguities."'" Majority op. at A-11 (quoting *Bose*, 466 U.S. at 512-13 (quoting *Pape*, 401 U.S. at 290)). *Bose* and *Pape* are not on point; the language they employ is tantalizing but not germane. while Masson's *meaning* might have been ambiguous, there was no ambiguity as to what words he uttered. Had Malcolm sought to paraphrase Masson's statements and, in doing so, used inopportune language that changed the nuance of what Masson said, she would have fallen squarely under the protective umbrella of the first amendment. As *Bose* points out, a writer faced with the "descriptive challenges," 466 U.S. at 512, inherent in recounting an event should not be punished for the use of a malapropism "simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time." *Id.* at 513.

A writer purporting to quote a third party faces no such interpretive challenges. By the use of quotation marks, she is representing that the choice of language was the speaker's, not her own. To be sure, plaintiff must still show that the writer was aware, or should well have been aware, that the quoted language was inaccurate. but making sure that quotations are accurate is a far simpler task than meeting the "descriptive challenges" a writer must face in supplying her own

characterization. Writers purporating to attribute a quotation are not, in my view, entitled to the type of broad deference afforded by *Bose* to writers faced with describing an event "that bristle[s] with ambiguities." *Id.* at 512 (quoting *Pape*, 401 U.S. at 290). The Supreme Court drew this distinction neatly in *Pape:*

> A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact — such as that a policeman has arrested a certain man on a criminal charge — there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. *Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.*

401 U.S. at 286 (emphasis added).

Although *Pape* permitted a news magazine to publish out-of-context quotations from a report of the Civil Rights Commission, it certainly did not purport to sanction the use of *invented* quotations. Selecting what portions of a text to excerpt involves an exercise of editorial judgment and *Pape* protects that judgment. But *Pape* does not hold that an author can invent or alter quotations so long as the doctored quotes are rational interpretations of what the subject said.

C. Because there are no cases precisely on point, I would start by examining the policies of the first amendment

as interpreted by the Supreme Court in *New York Times v. Sullivan* and elsewhere. As I read *Sullivan* and its progeny, they are designed to achieve two closely related but distinct purposes. First, they protect journalists and publishers from liability based on errors of fact they might commit in doing their jobs honestly and professionally. The reason for this is simple: Newspapers and other media regularly digest a veritable avalanche of facts; these facts must be gathered from diverse sources, not all of equal reliability; judgments as to accuracy must often be made on the basis of incomplete information and under the pressure of a deadline. Newspapers might never be published if they were required to guarantee the accuracy of every reported fact; time and manpower do not permit the type of verification that would prevent all mistakes. To avoid the stifling effect of massive liability, the press is given wide berth on questions of fact; reporters are held liable only for deliberate falsehoods or where they act recklessly.

The second policy involves *errors of judgment*. Closely related to the decision of what facts to report is the decision of how to report them. Words are a writer's stock in trade and selecting the words used to describe a particular event is not always a precise science. Indeed, selection of words is recognized as an art—literature—and creativity in the use of language is an important value in a free society. The first amendment fully protects this prerogative of the author and publisher; they are not required to agonize over every word or worry whether some libelous inference might be distilled from it. Rather, if there is an ambiguity, the writer is entitled to exploit it to the fullest, selecting such language as fairly comports with *a* reasonable view of the matter, not necessarily the view that would please the source. That is the proposition for which I understand *Bose* and *Pape* to stand.

These two policies provide, quite properly, a wide arena for journalists to perform in. We recognize that, as a consequence, people may suffer uncompensated harm, but this is a cost we willingly assume in order to preserve a far higher value: a free and robust press.

The right to fabricate or alter quotations is different. It does not serve the policy of protecting the press from errors of fact. What someone says is a fact no less than what someone does. *See* Taylor, *Holier Than Thou,* New York Magazine, Mar. 27, 1989, at 35. The press is ready protected from liability for inadvertent or negligent misquotations by the requirement that a libel plaintiff prove reckless or deliberate conduct. Thus, if a reporter takes notes and is unable to catch every word, she will be protected from liability even though she was negligent in failing to use a tape recorder or in double-checking her source. *New York Times v. Sullivan's* actual malice standard protects even the reporter who negligently misquotes a subject. *Harte-Hanks Communications, Inc. v. Connaughton,* 57 U.S.L.W. 4846, 4855 (June 22, 1989).

The real question here is whether changing the language of quotations is the type of judgment that a reporter must be free to exercise in performing her duties. Or, put somewhat differently, is the right to doctor quotations important to the operation of a free and robust press? The majority implicitly holds that it is. The answer, I submit, is far more complex; the question bears close analysis. For guidance, I would rely not on what the defendants here tell us in seeking to avoid liability, but on what is said by working journalists outside the litigation context.

Whether, and under what circumstances, journalists may alter or invent quotations has been the subject of considerable soul-searching within the profession. The fundamental rule,

widely accepted, is that "[q]uotation marks mean literally that the words they enclose are exactly as the source gave them—verbatim." M.V. Charnley & B. Charnley, *Reporting* 248 (4th ed. 1979). *Accord The Associated Press Stylebook and Libel Manual* 183 (1982) (direct quotations are used "[t]o surround the exact words of a speaker or writer when reported in a story"); J.L. Hulteng, *The Messenger's Motives: Ethical Problems of the News Media* 70 (1976) ("[m]ost of the newspaper codes or canons tend to stress literal accuracy when quoting news sources"). That is the standard to which *The New Yorker* aspires; according to William Shawn, editor-in-chief at the time Malcolm's article was published, "the New Yorker 'ideal is a verbatim quote'. . . ." Lipman, *At the New Yorker, Editor and a Writer Differ on the 'Facts'*, Wall St. J., June 18, 1984, at 1, col. 4.

Journalists have recognized, however, that "as a practical matter, it is not always possible for a reporter to be so literally accurate, unless there is a prepared manuscript, a trial transcript, or a tape recording to turn to." J.L. Hulteng, *The Messenger's Motives*, at 70. Accordingly,

> some working conventions have been built into the journalist's ethic where quotations are concerned. Even if every syllable hasn't been captured as uttered, even if every article isn't exactly in place, the quote can still be considered an acceptably accurate one if it honestly reflects what the speaker said.

Id. at 70-71. *See also* J. Olen, *Ethics in Journalism* 100 (1988) ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider."); S. Klaidman & T.L. Beauchamp, *The Virtuous Journalist* 50 (1987) ("standards can be set too high as well as too low").

Some reasons for failing to use verbatim quotes are relatively uncontroversial. Thus, the AP style manual advises that "[q]uotations normally should be corrected to avoid the errors in grammar and word usage that often occur unnoticed when someone is speaking but are embarrassing in print." *Associated Press Stylebook* at 184. Also,"[f]or those who must rely on written notes, there is the impossibility of getting all the words down, plus errors in note-taking and in deciphering hastily scribbled notes." J.Olen at 99.

Other types of changes are more controversial but under appropriate circumstances, they are considered acceptable by many, but not all, journalists:

> Deliberate improvements are often the result of compassion for the speaker. Many people speak less carefully than they write. They tend toward false starts, rambling and incomplete sentences, poor word choices, errors in agreement, and other infelicities that we are used to hearing but not reading. Thus, verbatim transcripts can prove an embarrassment to many speakers. Also, corrections, as well as condensations, can result from the reporter's desire to make the copy read better.

Id. Accord M.V. Charnley & B. Charnley at 248-50. Alterations of this type are not considered acceptable by everyone because they call for a judgment as to whether the speaker's meaning has been accurately preserved. Some authorities and publications therefore frown on the practice. M.V. Charnley & B. Charnley at 248; *see* pp. 36-37 *infra*.

Even those who deem it acceptable do so only subject to an "essential qualification": The altered quote must "honestly reflect [] what the speaker said." J.L. Hulteng, *The Messenger's Motives*, at 71. The authorities are adamant and uniform in condemning the use of altered quotes that are not faithful to the meaning intended by the speaker:

> No reporter has the right to manipulate the words of others so as to convey impressions that are distortions of the spirit of those words. You may misplace a comma or substitute one adjective for another and still not alter the thrust of a quote or paraphrase. But you have no license to violate the source's intent by changing the meaning of what he said, no matter what the motivation or temptation.
>
> . . .
>
> . . . The manipulation — or fabrication — of a quote in order to condition the reader's perception of a news figure or a news situation is a breach of journalistic ethics. . . .
>
> Absolute, literal accuracy can rarely be achieved, as we have noted earlier, but it is a firmly-rooted journalistic convention that the central meaning, the spirit, of a speaker's words must be truly conveyed.

Id.[12] *See also* J.L. Hulteng, *Playing it Straight: A Practical Discussion of the Ethical Principles of the American Society of Newspaper Editors* 64 (1981) ("Both the news source and the reader may be badly served unless the reporter operates with a urgeon's precision and with the fairest of motives.").

A more complex problem is presented when the story in question does not involve straight news reporting, but contains material of more lasting literary value, such as is frequently published by *The New Yorker*. A school of thought known as the New Journalism advances the view that an author has the right to vary or rearrange the facts of a story in order to

[12]There is, of course, a fundamental difference between altering a quotation slightly, while remaining faithful to "the central meaning, the spirit, of a speaker's words," and changing the words to conform to the writer's reasonable interpretation of what the speaker said. Under the central meaning standard, where the words uttered are ambiguous, they may not be altered to remove the ambiguity because that would change the spirit of what the speaker said; under the reasonable interpretation standard adopted by the majority, the author is given precisely that privilege. *See* majority op. at A-11-19, 28-59.

sadvance a literary purpose.[13] This is a highly controversial view among journalists, one not shared by many who have spoken on the subject.[14]

The profession's attitude toward this practice is perhaps best illustrated by an incident, involving *The New Yorker*, that took place in mid-1984, just a few months after Malcolm's articles were published. In the June 18, 1984, issue of *The Wall Street Journal*, *New Yorker* writer Alistair Reid disclosed that he "regularly used composite characters, nonexistent settings, and invented dialogue in what were purported to be nonfiction articles." J. Olen at 82. Reid explained that "[i]n reporting with some accuracy, at times we have to go much

[13]Tom Goldstein, dean of the Graduate School of Journalism, University of California at Berkeley, describes the New Journalism as follows:

> In an advertisement, *Harper's Magazine* tried defining New Journalism metaphorically as "somewhere west of journalism and this side of history," the "place where reporting becomes literature." In this unchartered territory, writers embellished quotes, burrowed into characters' interior thoughts, created scenes that may have happened but did not, and made up characters who were collages of real people.

T. Goldstein, *The News at Any Cost: How Journalists Compromise Their Ethics to Shape the News* 211 (1985).

[14]In 1980 writer John Hersey launched a ferocious attack upon the New Journalism. Hersey's premise was simple:

> . . . I will assert that there is no sacred rule of journalism. The writer must not invent. The legend on the license must read: *NONE* OF THIS WAS MADE UP. The ethics of journalism, if we can be allowed such a boon, must be based on the simple truth that every journalist knows the difference between the distortion that comes from subtracting observed data and the distortion that comes from adding invented data.

Hersey, *The Legend on the License*, The Yale Rev., Autumn 1980, at 1,2 (emphasis original).

further than the strictly factual . . . . Facts are part of the perceived whole." Dowd, *A Writer for The New Yorker Says He Created Composites in Reports*, N.Y. Times, June 19, 1984, at 1, col. 5. Reid also explained: "I would have 30 or 40 conversations with people and reflect their preoccupations . . . . If one followed them exactly, it would be terribly boring for the reader." *Id.* Reid claimed the right to manipulate the details of stories to get at a greater truth — the overall panoramic view that he wished his readers to experience.

The next day, *The New York Times* ran an editorial titled "The Fiction of Truth," criticizing Reid. The *Times* was perturbed that Reid had blurred the line between fact and fiction, to the ultimate detriment of the reading public and the journalistic profession:

> [F]ictional speculational and factual reporting provide radically different reading experiences. Fiction thrills by analogy, by the knowledge that unreal events can illuminate truthfully. Nonfiction excites by experience, by extending a reader's knowledge of reality and quest for understanding. Why should not writers, like carnival barkers, pretend that fictions are facts? First, last and always, because the reader lured into the House of Facts, poor sap, has paid to experience facts. The tritest truth is that the truth is more than facts . . . . A fact is a true phenomenon; truth is the ideal explanation of a fact. That is not a particularly difficult distinction. Yet too many people find profit in blurring it. Some mongers of mere fact, notably salesmen and politicians, routinely pretend to be revealing truth. And some mongers of opinion, claiming like Mr. Reid to have hold of a singular truth, are openly contemptuous of fact. When either type

shows up in our own ranks — or pages — we feel both cheated and devalued. Wrong truths are always correctable, with facts. Fictional facts are forever counterfeit.

The Fiction of Truth, N.Y.Times, June 20, 1984, at 26, col. 1. *Accord* Hersey at 20 ("In fiction, the writer's voice matters; in reporting, the writer's authority matters. . . . We read journalism . . . to try to learn about the external world . . . and the quality we most need in our informant is some measure of trustworthiness.").

In the days that followed, newspapers and magazines coast to coast carried the reactions of other journalists to the Reid disclosure, most of them negative. The *New York Times* quoted Fred Friendly, former president of CBS News and senior program adviser at the Columbia University Graduate School of Journalism, as saying "A composite is a euphemism for a lie . . . . It's disorderly . . . . It's dishonest, and it's not journalism." N.Y. Times, June 19, 1984, at 1, col. 5. Jack Beatty, senior editor of the *Atlantic*, when asked whether such practices were acceptable at his publication, replied, "No. Absolutely not. Our practice here is to check *everything*." Feeney, *New Yorker Responds to Accuracy Issue,* Boston Globe, June 20, 1984, at 44, col. 4 (emphasis original). *Time* magazine concluded that "Any departure from fact is the first step on a slippery slope toward unbelievability." McDowell, *New Yorker Editor Calls Reporting Style Wrong,* N.Y. Times, July 3, 1984 at C9, col. 1. James A. Michener, writing in the *Los Angeles Times,* expressed his respect for Reid but stated: "It is not healthy for a magazine to permit such deception, and if I were an editor I would try to prevent it." *Id.* *The New York Times* concluded that Reid's technique "would

violate the practices of most respected newspapers and magazines." N.Y. Times, June 19, 1984, at 1, col. 5.

Some journalists were more sympathetic, but nevertheless criticized Reid because he had failed to disclose the practice to his readers, who were therefore misled. *See, e.g.,* N.Y. Times, July 3, 1984, at C9, col. 1 (William F. Buckley, Jr.: "if that kind of thing is going on, somewhere along the line a reader should be tipped off"); N.Y. Times, June 19, 1984, at 1, col. 5 (Ken Auletta: "We shouldn't take shortcuts without telling the reader we're taking shortcuts, and by that I mean labeling it as fiction.").

While the Alistair Reid incident, and others like it, [15] have attracted a great many comments from the journalistic and publishing professions, the most telling reaction was that of*The New Yorker* itself. At first, editor-in-chief William

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[15] Professor Olen notes two notorious examples:

> In 1981, *Washington Post* reporter Janet Cooke was forced to return a Pulitzer Prize after she admitted to her editors that "little Jimmy, " an eight-year-old drug addict who was the focus of her prize-winning article, did not exist. He was, she said, a composite. The same year, the *New York Daily News* fired Michael Daly upon learning that a soldier appearing in a column Daly had written about Northern Ireland was a composite.

J. Olen at 97.

Shawn defended Reid.[16] Perhaps in response to the storm of criticism, on June 29, 1984, Shawn did an about-face, circulating a memorandum to *The New Yorker* staff condemning Reid's actions:

> "While he says he did not intend to deceive anyone, he violated New Yorker principles. He made a journalistic mistake. He was wrong. The editors of The New Yorker do not condone what he did.
>
> "We have eight people in our Checking Department who spend their days and, if need be, their nights rigorously verifying every checkable fact before it goes into the magazine. Every writer is held to the same severe standards of factuality. Errors still occur, but they are inadvertent and rare.
>
> "The New Yorker has devoted itself for fifty-nine years not only to fact and literal accuracy but to truth. And truth begins, journalistically, with the facts."

N. Y. Times, July 3, 1984, at C9, col. 1. Shawn also included the following exhortation in his memorandum:

> "We do not permit composites.
>
> "We do not rearrange events.
>
> *"We do not create conversations."*

Id. (emphasis added).

[16] *The Wall Street Journal* quotes Shawn as saying: "I've worked with Mr. Reid for many, many years. I trust him completely, and he's not trying to deceive anybody, including me . . . . He's a man of utter integrity, and that's all I have to know.'" Wall St. J., June 18, 1984, at 1, col 4.

The controversy surrounding the Reid disclosure is instructive. First, it points to the great resistance on the part of journalists and publishers to the blurring of fact and fiction. While it is recognized that many journalists do it, *see* Turovsky, *Did He Really Say That?*, Colum. Journalism Rev., July-Aug. 1980, at 38-39, the practice is widely condemned by those who have given the subject thoughtful consideration.

Moreover, what Reid was criticized for doing pales by comparison to Malcolm's alleged transgression. Reid rearranged events, created fictional characters and invented quotations, as a literary device, a way of getting his point across more effectively. But the quotations he invented or modified were not attributed to specific, identifiable people; they were attributed to such literary fictions as a taxi driver, people in a bar, an unnamed friend attending a college graduation. Reid used these fictional characters to better convey his own ideas; he did not put words into the mouths of real, flesh and blood individuals with reputations to be tarnished. The criticisms leveled at Reid must fall far more harshly on a journalist who deliberately twists the words of real, named individuals she purports to be quoting.[17] While I cannot claim to have made an exhaustive survey of the relevant literature, the materials I have examined — and there are quite a few of them — contain not a single instance where ajournalist asserted the right to distort quotes of real, identified people. I find it difficult to conclude, therefore, that the right to

[17] Shawn seems to recognize this distinction. While declaring that "the New Yorker 'ideal is a verbatim quote,'" he emphasized that "'the most important thing is not to violate the truth . . . of what somebody has said.'" Wall St. J., June 18, 1984, at 1, col. 4.

do so is important to the proper functioning of the press in a free society.

To be sure, the inability to modify quotes places a significant constraint on writers, but it is one that responsible journalists seem to accept willingly. Professor Olen makes the point bluntly: "If the speaker's actual words are completely unusable, even with a little help, the reporter can always resort to indirect quotation or a combination of indirect and direct, putting quotation marks around only usable phrases." J. Olen at 100-01. The point is made even more forcefully in the April 13, 1984, issue of *Winners & Sinners*, an internal "bulletin of second-guessing issued occasionally from the news desk of The New York Times":

> **When is a quote not a quote?** "That was a center of world terror that doesn't exist anymore," we quoted Ariel Sharon as having said of southern Lebanon (Feb. 26). But what he said — and what the reporter filed — was less succinct: "That was a center of world terror; that center of world terror doesn't exist anymore." Scant difference in meaning, but a larger difference ethically: Quotation marks guarantee the reader that we're transmitting the subject's words, *literally*. If the speaker isn't terse enough to suit us, we can tidy up the prose — but only after removing the quotation marks.

Tone of the Times, Winners & Sinners, Apr. 13, 1984, at 1 (emphasis original).

The standards and aspirations of the profession are not, of course, dispositive of the legal question before us.[18] *Harte-Hanks Communications, Inc. v. Connaughton*, 57 U.S.L.W.

4846, 4848 (June 22, 1989). But our ruling rests on constitutional grounds; it limits the operation of state libel law in order to preserve the higher values protected by the first amendment. Unlike my colleagues, I am unable to construe the first amendment as granting journalists a privilege to engage in practices they themselves frown upon, practices one of our defendants has flatly disowned as journalistic heresy. *See* pp. A-65-66 *supra*. The press can legitimately claim the right to editorial judgment when it is selecting the words itself; it cannot, and does not, claim the right to select words for others.

II

Unlike the majority, I would start with the proposition that what somebody says is a fact, and that doctoring a quotation is no more protected by the first amendment than is any otherfalsification. In resolving a case such as this I would therefore engage in a five-step inquiry: (1) Does the quoted material purport to be a verbatim repetition of what the speaker said? (2) If so, is it inaccurate? (3) If so, is the inaccuracy material? (4) If so, is the inaccuracy defamatory? (5) If so, is the inaccuracy a result of malice, *i.e.*, is it a fabrication or wasit committed in reckless disregard of the truth? If the answer to any of these questions is no as a matter law, the inquiry stops and the defendant wins. If they could all be answered yes, I would send the matter to the jury. Tested

[18] It would, in any event, be naive to take journalists entirely at their word as to what is, and is not, considered ethical in a profession not completely free from breast-beating and finger-pointing. *See* Karlen, *Naked City*, Spy, June 1989, at 32.

under this standard, the summary judgment granted by the district court in favor of defendants must be reversed.

(1) Does the Quoted Material Purport to be a Verbatim Rendition of what Masson Said?

While putting a statement in quotes normally indicates that it is precisely what the speaker said, that is not always the proper inference. For example, in *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 354, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 107 S. Ct. 880 (1987), the defendant newspaper published codefendant Bunzel's review of a television documentary on sexual education produced by plaintiff. The review contained the following passage:

> "My impression is that executive producer Walt Baker, who is also vice president in charge of programs for Channel 9, told his writer/producer, Phil Reeder, 'We've got a hot potato here — let's pour on titillating innuendo and as much bare flesh as we can get away with. Viewers will eat it up!'"

42 Cal. 3d at 258, 721 P. 2d at 89, 228 Cal. Rptr. at 208. The California Supreme Court held that, even though Bunzel used quotation marks, he was not in fact purporting to quote Baker:

> Nowhere is it asserted as a fact that Baker made the disputed statement. Instead, Bunzel explicitly qualified the disputed statement by warning the reader that he was not reporting a fact but only giving his"impression." By

> employing that term, Bunzel made it clear that he intended only to convey his opinion about what Baker might have said to his writer/producer.

42 Cal. 3d at 263, 721 P.2d at 92, 228 Cal. Rptr. at 211.

Baker provides merely one example of how a writer may diffuse the inference that the material in quotes purports to repeat precisely what the speaker said. There are many others.[19] The issue, as in *Baker*, is whether the reader is expected to understand that the quote is verbatim, a paraphrase or merely a rhetorical device.

The record here presents substantial evidence supporting the view that Malcolm uses quotation marks to indicate that she is reporting precisely what various speakers, including Masson, said. Unlike the reviewer in *Baker*, Malcolm does not use the quotation marks as a rhetorical device to emphasize her

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[19] Authorities in the field of journalism are fairly uniform in suggesting that if authors or publishers have a policy of altering quotes or other facts, they disclose that policy to the reading public. *See, e.g.*, T. Goldstein, *The News at Any Cost: How Journalists Compromise Their Ethics to Shape the News* 203, 206 (1985). Professor Olen gives a few examples of how this might be accomplished:

> Readers should know that reconstruction and cleaning up are going on. If they don't, they are being misled, however benignly. Newspapers and magazines have a variety of ways of telling their readers. A column on the op-ed page under a title like" Why People in Newspapers Talk So Much Better than You Do" is one. A frank admission of quotation policy in the ombudsman column of a newspaper or editor's page of a magazine is another.

J. Olen at 101.

An elegant and unobtrusive example of such disclosure is provided by Dr. Nathaniel Branden in an "Author's Note" to his recently published memoir:

> In instances where I reproduce conversations that took place many years ago, I am not suggesting that all of the words reported are verbatim, but I am

message; there is no cautionary language to put readers on notice that she is relating a "hypothetical conversation," 42 Cal. 3d at 264, 721 P.2d at 93, 228 Cal. Rptr. at 211, or a fictionalized account of Masson's life told in the first person. Statements are attributed directly to him and to others without any indication that they had been materially edited, stylized or otherwise altered. The two long *New Yorker* articles purport to present a serious report of an academic debate in thepsychoanalytic community; they contain absolutely nothing that would counsel the reader to doubt that Masson said precisely what Malcolm quotes him as saying. *Cf. Baker*, 42 Cal. 3d at 260, 721 P.2d at 90, 228 Cal. Rptr. at 209. Finally, there is "*The New Yorker's* vaunted reputation for accuracy," T. Goldstein at 206, and the public statements made by its editors reinforcing their commitment to this principle. *See* pp.

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confident they are faithful to the essence of what was said, and to the spirit and mood of the occasion. This conviction has been reinforced by those, acknowledged below, who knew one or more of the people about whom I write and who affirm that my characterizations match their own memories of the individual's attitudes, beliefs, behavior, and spoken style.

In the course of this book I recreate a great many conversations with Ayn Rand. Prior to our break, Ms. Rand said publicly and on more than one occasion that I knew her thoughts more profoundly and specifically than any other human being and that I was qualified to speak for her on virtually any aspect of her ideas or convictions.

N. Branden, *Judgment Day: My Years With Ayn Rand* ix (1989).

An explicit statement may not be required if it is clear from context "that the use of quotes is for dramatic effect and not to indicate an exact rendering." J. Olen at 98. Professor Olen cites as an example a book where the author gives verbatim quotes of conversations which he clearly did not witness. *Id.*

A-86-87 *infra*. There is thus much in the record to support the view that *The New Yorker's* readers would understand a quote to be a quote.

Masson's case is far more like *Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985), which held that a magazine's false attribution to actor Tom Selleck's father of statements about his son's love life could support a cause of action for libel. The court noted that the article did "not merely express defendant's opinion that plaintiff made statements about his son. Rather, [it] assert[ed] as a fact that plaintiff made the statements." *Id.* at 113, 212 Cal. Rptr. at 845. Like the article about Robert Selleck, Malcolm's articles gave the clear impression that the subject had made the statements in the course of interviews with the reporter.

(2) Are the Quotes Inaccurate?

Where, as here, an interview is on tape, ascertaining whether a quotation is inaccurate involves a straightforward comparison between what the speaker said and what he is reported as having said. But, as *Dunn* demonstrates, occasionally even this inquiry may be fraught with difficulty. Where, for example, a translation is involved, or where the speaker's statement is partially inaudible, the writer may have to make a judgment as to what the speaker actually said. If such judgment is required, the writer's choice must be respected, absent a showing of deliberate or reckless fabrication.

There is no claim here that Masson's statements were inaudible, or that they were made in a language other than English. No judgment was therefore called for in determining what Masson actually said. Because what Masson was quoted

as saying is alleged to differ from what he actually said, I would move on to the next inquiry.

(3) Are the Inaccuracies Material?

One need only read a few trial transcripts to realize that the way most people talk is not particularly suitable for publication. There are many fragments and other grammatical abuses; the speaker will often say "uh" and "ah" and "you know"; occasionally he will make a false start and go back and correct himself; he may introduce irrelevancies and go off on tangents. A conscientious reporter will try to fix some of these problems, both to make a more readable story and keep the speaker from looking foolish. Turovsky, *Did He Really Say That?*, Colum. Journalism Rev., July-Aug. 1980, at 39. Such cosmetic changes are not questionable because they are not material. They delete or correct matters that do not go to the substance of what the speaker has said and are irrelevant to the content of his communication.

None of the changes Masson complains of fit into this category. If we compare Masson's version of what he said with what Malcolm quotes him as saying, it is clear that Malcolm's alterations are designed to do more than clean up peripheral aspects of Masson's language; they completely rephrase his statements or, in some instances, invent them out of whole cloth.

For example, the article quotes Masson as saying that Freud's "entire theory after he abandoned seduction was the product of moral cowardice. . . ." Malcolm II at 109. Masson, however, is taped as having said: " I think [Freud] was a great and remarkable thinker but he was still a, a, a man who just lost his courage. . . . He was a brilliant mind who

didn't have the courage to stick with things that he knew were true." Transcript of the Masson/Malcolm Tapes, vol. 1, part 1, at M110. While the two statements say generally the same thing, they are not the same. The quoted statement introduces "moral cowardice," a different, and arguably stronger, term than "didn't have the courage." Moreover, the quoted statement deletes Masson's tribute to Freud as "a great and remarkable thinker" and "a brilliant mind." As a consequence of these changes, Masson is made to sound far more disdainful of Freud than he actually was. While the statement, as altered, may or may not be libelous (the subject of the next inquiry), it is difficult to say that the changes were merely cosmetic or immaterial.[20]

(4) Were the Alterations Defamatory?

Under California law, "[l]ibel is a false and unprivileged publication by writing, printing, . . .which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendencyto injure him in his occupation." Cal. Civ. Code § 45 (West 1982). The scope of libel under section 45 is construed broadly to encompass language having the natural tendency to injure reputation. *Moore v. Greene*, 431 F.2d 584, 592 (9th Cir. 1970). Our inquiry here is whether the falsehoods in Malcolm's articles "cast [Masson] in a disparaging light since

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[20] An immaterial change might have been the removal of "still a, a, a man," obviously an unintended hesitation, and the substitution of "still a man."

they portray his language and conduct as crude, aggressive, and unprofessional." *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 77, 155 Cal. Rptr. 29, 38 (1979).

As discussed above, and as the majority seems to concede, California law recognizes a cause of action for libel on the basis of misquotations that have the same damaging effect as defamatory statements. *Baker*, 42 Cal. 3d at 261, 721 P.2d at 91, 228 Cal. Rptr. at 210; *Selleck*, 166 Cal. App. 3d at 1132, 212 Cal. Rptr. at 844. At least some of the misquotations, if proved at trial, would support a jury verdict for the plaintiff. *See* pp. A-37-49 *supra*.

Some of the other allegedly altered quotations would probably not be defamatory, at least standing alone, e.g. "it sounded better" and "Denise worries too much." However, the various misquotations do not stand alone; they reinforce each other. Together they help paint Masson as a vain, shallow, disingenuous, intellectually dishonest, cold, heartless, self-absorbed individual. The tapes, containing Masson's own words, paint a different picture. Or so a jury could reasonably conclude.

The majority relies on *Herbert v. Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986), to support its conclusion that the "intellectual gigolo" quote in particular is not defamatory. Majority op. at A-15-16. This reliance (on a case and a doctrine mentioned by neither party) is troubling for a number of reasons. For starters, while the first amendment limits the class of defamatory statements that can give rise to a cause of action for libel, whether or not a statement is defamatory in the first place is an issue of state law. The majority cites no California authority; *Herbert's* "incremental harm" doctrine, as far as I can tell, has never been adopted as the law of California. In fact the law of California leans in the

opposite direction: In order to determine whether a statement is one of fact, which is actionable, or opinion, which is not, "[t]he publication in question must be considered in its entirety; it may not be divided into segments and each portion treated as a separate unit." *Baker*, 42 Cal. 3d at 261, 721 P.2d at 91, 228 Cal. Rptr. at 209 (brackets and internal quotation marks omitted). To the extent the majority seeks to graft *Herbert* onto California defamation law, it fails to reconcile the apparent conflict with the state supreme court's opinion in *Baker*.

Second, the majority fundamentally misreads *Herbert*. *Herbert* scrupulously avoids holding that if incremental harm above nonactionable portions of a publication is only minimal, then the plaintiff cannot recover as a matter of law. Judge Kaufman discusses the doctrine (which he finds only in district court cases), but then explicitly refrains from applying it: "We believe, however, a reasoned and *different* ground exists in this case. . . ." *Herbert*, 781 F.2d at 311 (emphasis added). The holding of *Herbert* is in fact very different, and quite unexceptional: The court concludes that if the defendants' published view that Herbert lied about reporting war crimes is not actionable, then other statements merely implying the identical view are not actionable either. *Id.* at 312. This is a far cry from saying, as does the majority, that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally defamatory but unactionable, even if on an entirely different subject.

In fact, the incremental harm doctrine has never before been adopted by any federal appellate court. It has been explicitly and convincingly rejected by the D.C. Circuit, which noted that "[e]ven the public outcast's remaining good

reputation, limited in scope though it may be, is not inconsequential." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.), *rev'd on other grounds*, 477 U.S. 242 (1986). The majority advances no rationale as to why we should breathe life into this stillborn doctrine.[21]

Finally, the majority's reasoning fails on its own terms: Even if we assume California would adopt the majority's incremental harm doctrine, we would be unable to find the "intellectual gigolo" quotation, or any of the others, nondefamatory as a matter of law. The majority finds "intellectual gigolo" (and by implication the other quotes at issue) no more defamatory than "the many provocative, bombastic statements indisputably made by Masson." Majority op. at 16. But the majority does not tell us which statements it is referring to. Fact is, the most "provocative, bombastic statements" attributed to Masson are the ones Masson disputes having made. The majority has pointed to

[21] *Liberty Lobby* rejected the incremental harm doctrine both as a matter of District of Columbia law and as a matter of federal constitutional law. 746 F.2d at 1569. To the extent the court today accepts the doctrine on constitutional grounds, it is creating a square conflict with the District of Columbia Circuit.

not a single statement out of the 1056 page Masson/Malcolm interview that is so outrageous as to render the expression "intellectual gigolo" trivial by comparison. I believe there are none.[22]

(5) Were the Alterations the Result of Malice?

Having determined that Malcolm's alterations of Masson's statements were intended to be read as direct quotations, that Malcolm was not required to exercise judgment, that the alterations were material and that they aware potentially libelous, I would then turn to the question of malice. Because I view quotations as facts, not opinion, I would ask a simple question: Did the defendants know that Masson's actual statements differed from those attributed to him or did they act with reckless disregard with respect thereto? More precisely at this stage of the proceedings, I would ask whether the plaintiff has proffered sufficient evidence to allow a rational jury to so conclude. Because each defendant stands on a somewhat different footing, I will discuss them separately.

[22] The majority also finds that "the 'intellectual gigolo' quotation is not defamatory" because "a fair reading of the quotation shows author Malcolm is portraying Masson as reporting Kurt Eissler's and Anna Freud's opinions about him." Majority op. at A-15. I am baffled by this reasoning; surely the intellectual gigolo label is going to harm Jeffrey Masson's career whether he uttered it about himself or whether it reflected Eissler's and Freud's assessment of him. For Eissler, Masson's employer, to call him an intellectual gigolo is, I should think, at least as bad as for Masson to so call himself.

Rightly troubled about giving a journalist the power to force a subject to call himself an intellectual gigolo, the majority resorts to a number of strategies to avoid the term's impact. *See id.* at 14-16. As demonstrated here and *supra* at A-41-44, none of these work; the majority must accept the full consequences of its holding.

(a) Janet Malcolm

The circumstantial evidence that defendant Janet Malcolm acted with malice, deliberately or recklessly altering Masson's statements, is very strong indeed. In the first place, Malcolm had in her possession tapes of many hours of interviews at the time she prepared the article. Many of the passages she attributes to Masson bear a striking resemblance to taped passages, except that key words are changed, added or deleted. This alone raises a strong inference that Malcolm took liberties with Masson's quotes. At the very least, it suggests that she quoted from memory or from handwritten notes and then neglected to verify the accuracy of the quotes against the tapes. [23] It is significant in this regard that Malcolm was not working under a tight deadline. She had the luxury of drafting and editing her document at leisure; she apparently had a chance to review galley proofs. There is no suggestion that *The New Yorker* tore the manuscript out of her hands before she could verify its accuracy.

The record also contains at least one piece of direct evidence that Malcolm engaged in deliberate fabrication. Discussing his plans for Anna Freud's house, Masson said, "it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and — Well, that's what it needs, but it is an incredible storehouse. I mean the library. . .

[23] Malcolm suggests an alternative source for the offending quotations, namely her notes of non-taped conversations where Masson allegedly made those statements more or less verbatim. But the jury might well disbelieve Malcolm's account of these alleged conversations, conversations that Masson denies ever took place. *See* n.7 *supra*. Because we are reviewing a grant of summary judgment against Masson, we must indulge these inferences in his favor.

" ER at 122. Malcolm's typed draft reads, "Sun would have come pouring in, people would have come, there would have been parties and laughter and fun." ER at 117. This sentence is crossed out, and the following sentence, to which Masson takes exception, is handwritten above it: "Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun." *Id*. Since the alteration departs from Masson's statement even more than Malcolm's original version, the jury could easily infer that Malcolm made the change in a deliberate effort to distort what Masson said or with reckless disregard to whether it accurately reflected Masson's words. More broadly, the jury might infer that Malcolm considered Masson's quotes a proper subject for substantive editing, and that she did not feel constrained to quote accurately what Masson actually said.

Other, somewhat less compelling, indicia of malice round out the picture. For example, in her article Malcolm attributes certain of Masson's statements to a telephone conversation. Malcolm II at 117-18. She now claims that those statements were, in fact, made while Mason visited her in May 1983, at a time when her tape recorder was broken. Her inconsistency might be viewed as poetic license, but it might also be taken as proof of deliberate fabrication. The jury might also find it significant that Malcolm represented to William Shawn, editor-in-chief of *The New Yorker*, that every quote from Masson was on tape, CR 101 at exhibit 14; she repeated the assertion in a letter to *The New York Times*, N.Y. Times Book Review, July 8, 1984, at 33, col. 1. She now takes the position that some of the conversations were not recorded and that she took notes. A jury might well conclude that Malcolm's representation to her publisher that "everything was on tape," and her public reiteration of that statement, were accurate and

that her more recent claim that there were conversations not on tape is a fabrication.

Finally, Masson claims that Malcolm made affirmative representations to him about the accuracy of his quotations. According to Masson, Malcolm asked him whether she could tape record the interviews and "explained that this would be to [Masson's] advantage, since it would mean there would be no misquotations." CR 100 at 2. Also according to Masson, "[a]t several points throughout our interviews, I told her I was concerned that she quote me accurately. She said that she had it all on tape, and I was not to worry since all quotations would be verbatim." *Id.* at 2-3. *See also id.* at 5 ("Malcolm repeatedly assured me that the quotations ascribed to me would be absolutely accurate, verbatim quotations, since they would come directly from her tapes."). Should the jury believe Masson, they could view this as a significant indication of malice. First, they could consider it as proof that Malcolm intended to deceive Masson about her intentions with respect to the quotes. Also, if Malcolm warranted to Masson that she would take all quotes verbatim off the tapes, I should think it would be at least reckless of her not to use the tapes to verify the accuracy of the quotes she used.

The jury may, of course, disbelieve Masson's account of many of these disputed facts. Or, it may decide that, under all the circumstances, Malcolm was merely careless, not deliberate or reckless. But a jury might well come to a more sinister conclusion. I respectfully suggest that were a jury to do so on this record, we would exceed our authority in saying that they were wrong.

(b) The New Yorker

Even if Janet Malcolm were found to have acted with malice, it would not necessarily follow that *The New Yorker* did as well. Because Malcolm is claimed to be an independent contractor, not an employee, her state of mind would not necessarily be attributed to the magazine. [24] The publication is not totally absolved from liability, however; the question is whether, given what it knew or should have known, it acted deliberately or with reckless disregard of the truth.

There is nothing on this record to suggest that *The New Yorker* was guilty of deliberate fabrication, except insofar as it might have knowingly approved Malcolm's alterations. *See* n.26 *infra* and accompanying text. However, there is plenty of evidence of recklessness.

First, Masson alleges that he brought the inaccuracy of the quotations to the attention of Nancy Franklin, a member of *The New Yorker*'s fact-checking department. CR 100 at 6. According to Masson, "I asked her if it would be possible for her to read back all the quotations ascribed to me, since we were finding so many errors in the few passages she asked me about. She said this was not possible, but that I was not to worry, there were tape-recordings of all the conversations, and

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[24] Masson claims that Malcolm is in fact an employee. Brief for Appellant at 46. If at trial Malcolm were found to be an employee of *The New Yorker* acting within the scope of her employment, the magazine could be held liable under the doctrine of respondent superior. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974).

they would be verbatim and accurate." *Id.* at 6-7.[25] At Masson's insistence, Franklin promised to check with Malcolm about the possibility of having all the quotes read to him; Franklin promised to get back to Masson the matter but

[25]Interestingly, "[a]t *The New Yorker*, quotations are generally not subjected to the magazine's rigorous fact-checking requirements. The rationale for this, according to Martin Baron, the magazine's chief fact-checker, is that a source cannot be expected to remember weeks or months later his precise words. Further, said Baron, a source might subsequently deny having said something because the statement places him in an unflattering light." T. Goldstein, *The News at Any Cost: How Journalists Compromise Their Ethics to Shape the News* 205 (1985) (relying on an interview with Martin Baron, January 25, 1985). These reasons seem entirely inapposite where the editors are aware that the conversations are on tape.

The New Yorker is not unique in refusing to clear quotations with sources. Some authorities believe that this is a mistake. Dean Goldstein, for example, suggests that "[a] lot of the mistrust between journalists and those whom they interview could be reduced if journalists were more willing to clear quotations or articles with the subjects of interviews before publication." *Id.* at 204. Professor Olen recognizes the risk that the source may wish to disown unflattering quotes, but nevertheless commends the practice: "The purpose of quoting people is rarely to get down which [words] they picked [to express an idea] on a particular occasion, but to give readers a feel for their personalities and how they express themselves. If the speakers are satisfied with the quotes, the journalist has fulfilled that purpose." J. Olen, *Ethics in Journalism* 100 (1988).

she never did. *Id.* at 7.[26]

Masson's conversation with Franklin should have put *The New Yorker* on notice that something was amiss. Because Malcolm had represented to *The New Yorker's* editor-in-chief that all of her quotations were on tape, it would have been relatively simple to resolve the dispute. *The New Yorker's* apparent failure to do so would justify a jury finding that the magazine acted in reckless disregard of the truth. *See Harte-Hanks Communications, Inc. v. Connaughton*, 57 U.S.L.W. 4846, 4853 (June 22, 1989)("The newspaper's decision not to listen to the tapes of the Stephens interview in Connaughton's home also supports the finding of actual malice.").

In his brief, Masson claims that *The New Yorker* was once again put on notice of the alleged misstatement when Masson's lawyer wrote to the magazine after the first part of the Malcolm article appeared. Brief for Appellant at 46. *The New Yorker* apparently did not attempt to verify the balance of the article or to make any corrections. A jury might reasonably infer recklessness from this conduct as well. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

[26]The record corroborates portions of Masson's account of this incident. Nancy Franklin is, in fact, a fact-checker for *The New Yorker* and, on deposition, admitted that she had talked to Masson about the Malcolm piece. CR 96, exhibit F at 64. A number of the corrections Masson claims to have suggested to Franklin in fact found their way into galleys but did not make it into the published version of the article. *Compare* CR 100 at exhibit 3 *with* Malcolm II at 106; CR 100 at exhibit 4 *with* Malcolm I at 59.

Finally, a jury could consider *The New Yorker's* widely-acclaimed reputation for scrupulous accuracy in determining whether it acted in a reckless manner. *See, e.g.*, Wall St. J., June 18, 1984, at 1, col. 4 ("the New Yorker, often touted in journalistic circles as a magazine whose statements of fact can be taken without benefit of any grains of salt"); *id.* ("'I would say they're about the most careful (publication) about checking facts,' says Spencer Klaw, editor of the Columbia Journalism Review."); Boston Globe, June 20, 1984, at 44 col. 4 (referring to "the New Yorker magazine's longstanding reputation for unrivaled accuracy"); N.Y. Times, July 3, 1984, at C9, col. 1 (quoting writer Renata Adler as stating that "The New Yorker set a kind of standard for factual accuracy"); *id.*, June 20, 1984, at 26, col. 1 (describing *The New Yorker's* fact-checkers as "legendary"); T. Goldstein at 206 (referring to *"The New Yorker's* vaunted reputation for accuracy").

The New Yorker's reputation for accuracy is no accident; it is an image it nurtures assiduously. At about the time Malcolm's article was published, editor-in-chief William Shawn proclaimed that "New Yorker reporting is 'as close to being scientific in its objectivity as reporting can be;'" he added that " the magazine tries to have 'no advocacy, to have no prejudices'" and that "'[a]t the New Yorker, not only accuracy but truthfulness is sacred.'" Wall St. J., June 18, 1984, at 1, col. 4. Martin Baron, head of *The New Yorker's* fact-checking department that allegedly verified the accuracy of Malcolm's articles, graphically announced; "'If we say the paint on the wall of the hospital is yellow, it's yellow' . . . . Every detail is absolutely correct down to whether or not there were coffee stains and tobacco ashes on the floor of the hospital' in a given piece." *Id.* In a burst of exuberance,

Shawn proclaimed that "'the New Yorker is the most accurate publication not only in this country, but in the entire world.'" *Id.* As to quotations, Shawn declared that "the New Yorker 'ideal is a verbatim quote.'" *Id.*[27]

Few publications have the bravado to give such categorical assurances to the reading public. By doing so, *The New Yorker* has induced a reasonable expectation of accuracy in the minds of sources and readers. The former are more likely to speak without reservation, lulled into believing that they will not be misquoted; the latter are more likely to accept at face value the quotes they read in *New Yorker* articles. A jury might well consider all of this relevant in determining whether *The New Yorker* was reckless.

(c) Alfred A. Knopf

Defendant Alfred A. Knopf's potential liability stands somewhere between that of Janet Malcolm and that of *The New Yorker*. While a book publisher, like a magazine publisher, has a right to rely on those who submit manuscripts to it, it does not have the right to ignore clear indications that material it is about to publish is libelous. Knopf published Malcolm's article in book form in May 1984, five months after the article first appeared in *The New Yorker*. By that time, Masson's allegations were known to Knopf's president. CR 101 at exhibit 41. Like *The New Yorker*, Knopf had a means for resolving the dispute: It could have asked Malcolm to document the disputed quotes, particularly by reference to the tapes. If, on the basis of such an examination, Knopf had

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27This statement seems somewhat at odds with *The New Yorker's* policy regarding the checking of quotations. *See* n. 25 *supra*.

concluded, wrongly perhaps, that Malcolm's quotes were accurate, I would hold it harmless. *See Hotchner*, 551 F.2d at 913-14 (discussed pp. A-51-53 *supra*); *Velle Transcendental Research Ass'n, Inc. v. Sanders*, 518 F.Supp. 512, 519 (C.D. Cal. 1981) (publisher has no subjective awareness of falsity or reason to suspect that material is false where there had been no prior complaint about author, author was believed to be reliable and defendant relied on reputation of previous publisher). But failure to investigate the matter at all could well amount to recklessness, particularly where a book publisher (unlike a magazine) is not operating under a tight publication deadline. I can see no justification for allowing a publisher to reprint an article accused of containing libelous material without bothering to investigate the matter, when a simple, foolproof method of investigation was available. A jury might easily conclude that Knopf's cavalier treatment of Masson's complaint amounted to a reckless disregard of the truth and, if it did, we should have no choice but to affirm.

Conclusion

Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. To have that assertion made by *The New Yorker*, widely acknowledged as the flagship publication when it comes to truth and accuracy, debases the journalistic profession as a whole. Whatever it might have taken to refute Masson's allegations on the merits is not, in my view, worth the unsettling implications left by defeating him on these grounds. Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[686 F. Supp. 1396]

[No. C-84-7548 EFL; August 17, 1987]

JEFFREY M. MASSON,
Plaintiff

v.

THE NEW YORKER MAGAZINE, INC.;
ALFRED A. KNOPF, INC.; JANET MALCOLM
Defendants

ORDER GRANTING
SUMMARY JUDGMENT

I. INTRODUCTION

This is an action for defamation and invasion of privacy brought by Jeffrey Masson against defendants Janet Malcolm, *The New Yorker* magazine, and Alfred A. Knopf, Inc. The dispute arises out of an article written by defendant Malcolm based primarily upon extensive tape-recorded interviews given to Malcolm by Masson.

Malcolm's article describes how Masson quickly became relatively prominent in the field of psychoanalysis, and was appointed Projects Director of the Freud Archives. Masson claimed to have made many discoveries regarding material that had been suppressed by the psychoanalytical "establishment." The article explains Masson's belief that this information leads to conclusions that will result in the destruction of established psychoanalytic theories and of psychoanalysis itself. As a result of his outspoken criticism of Freudian psychoanalysis, he was fired from his position at the Freud Archives, and rejected by his colleagues.

The 48,500-word article was published in successive issues of *The New Yorker* magazine on December 5 and 12, 1983, and was reprinted by defendant Knopf in a 165-page book entitled *In the Freud Archives*. The publications were based upon 1,065 pages of tape transcripts and notes. Plaintiff claims that misquotations in the article and book[1] falsely portray him as egotistical, vain, and lacking in personal honesty and moral integrity.

This Court has required plaintiff to amend his complaint to specifically identify each passage in the article upon which he relies in asserting that the article is libelous. In his Fourth Amended Complaint, Masson identified twelve allegedly libelous passages. On August 19, 1986, this Court granted partial summary judgment, holding that four passages were substantially true and could not be relied upon to support plaintiff's claim of libel. Currently before the Court is defendants' second motion for summary judgement. Defendants argue that no genuine issue of material fact exists

[1]The book and the article are substantially identical in content, and will be jointly referred to as "the article."

on the issue of whether defendants published any of the remaining eight statements with actual malice.[2]

For the reasons discussed below, this Court grants summary judgment in favor of all defendants.

II. APPLICABLE LAW

The parties agree that plaintiff is a public figure. A libel plaintiff who is a public figure bears the burden of proving with clear and convincing affirmative evidence that defendants published a statement with actual malice. *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2513 (1986).

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.
>
> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the

[2]Several of the statements alleged in the Fourth Amended Complaint were not alleged in prior complaints and thus were not considered by this Court in its prior order. Plaintiff also argues, based upon newly-discovered evidence, that this Court erred in its prior order when it held that one of the statements was substantially true.

prism of the substantive evidentiary burden.
Id.

The actual malice standard requires proof of a subjective mental element of knowing falsity or a reckless disregard of falsity by a defendant. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Reckless disregard can be established only if defendants "in fact entertained serious doubts" about the truth of the story before publication. *St. Amant v. Thompson*. 390 U.S. 727, 731 (1968). The actual malice inquiry focuses on defendants' state of mind regarding the truth of the statements. *Monitor Patriot Company v. Roy*, 401 U.S. 265, 276 (1971). Therefore, in order to defeat a properly supported motion for summary judgment, plaintiff must produce clear and convincing evidence that defendants knowingly and falsely published the alleged defamatory statements, or in fact entertained serious doubts as to the truth of the alleged statements, yet recklessly disregarded those doubts.

Courts have "clearly recognized the need for a certain degree of literary license when properly applying the *New York Times* standard to the facts of each case." *Reader's Digest Association v. Superior Court*, 37 Cal. 3d 244, 261 (1984). "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* (quoting *New York Times*, 376 U.S. at 271-72). A writer is entitled to select one of several possible rational interpretations of an event which "bristled with ambiguities and descriptive challenges" for the author. *Reader's Digest*, 37 Cal. 3d at 262 (quoting *Bose Corporation v. Consumer's Union*, 466 U.S. 485, 512 (1984)). "The choice of such

language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Bose*, 466 U.S. at 513.

Similarly, fictionalization or dramatization of conversations does not satisfy the requirement of clear and convincing evidence from which a jury could find defendants published the alleged defamatory statements with actual malice, so long as the change does not "increase the defamatory impact or alter the substantive content" of the actual statement or statements upon which the author relied. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). The inclusion of quotation marks in a passage does not require complete accuracy; a writer may resort to rhetorical license. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 263-64 (1986), *cert. denied*, 107 S. Ct. 880 (1987).

III. DISCUSSION

This Court has carefully analyzed each disputed passage separately,[3] comparing the alleged defamatory material with relevant portions of the tape-recorded interviews to determine whether rational jurors could find by clear and convincing evidence that defendants entertained serious doubts about

[3]This method of analyzing each claimed defamatory statement separately was approved in a situation such as this case, in which the defamatory impact of the publication as a whole is the same as the defamatory implication conveyed by each of the individual statements. *Herbert v. Lando*, 781 F.2d 298, 307 (2d Cir.), *cert. denied*, 106 S. Ct. 2916 (1986). In this case, the defamatory impact is that Masson is a vain, arrogant egotist.

the accuracy of the printed material.[4]

No direct evidence of actual malice exists. The writer, Malcolm, has stated in a declaration that she does not think, "and did not think before publication, that any quotations in the article .or book were distorted or taken out of context." She has further maintained that:

> I quoted Mr. Masson accurately, I presented him as he presented himself to me, and in writing my article/book I was consistently and solely guided by the ambition of making him as lifelike and real as possible so that my readers would get the same sense of him that I had received from actually knowing him. I invented nothing. I never harbored the slightest ill-will toward Mr. Masson . . . .

Declaration of Janet Malcolm in Support of Defendants' Motion for Summary Judgment at 5.

Plaintiff claims that the requisite malice can be inferred simply based upon the alleged literal inaccuracy of the statements or the fact that Masson did not actually use the precise words that Malcolm attributed to him. However, this method of inferring malice has been disapproved by the Supreme Court. *Bose*, 466 U.S. at 512; *Time, Inc. v. Pape*, 401 U.S. 279, 285-86 (1971). A report of what someone has said about an event "can contain an almost infinite variety of shadings." *Id.* at 286. The fact that an author selected "one

[4]Malcolm has also submitted handwritten and typed notes as support for her claim that she did not entertain serious doubts about the statements' accuracy. Plaintiff disputes the accuracy and authenticity of the typed notes; therefore, this Court will disregard those notes in its analysis.

of a number of possible rational interpretations" of a conversation or event that "bristled with ambiguities" is "not enough to create a jury issue of 'malice'". *Bose*, 466 U.S. at 512-13; *Time, Inc.*, 401 U.S. at 290. This Court therefore focuses its inquiry on whether the author's choice of words in each disputed passage was a rational interpretation of Mr. Masson's tape-recorded statements.

A. The Disputed Passages

1. "It Sounded Better"

Malcolm quoted Masson as stating:

> My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too . . . named Moussaieff, who went to Paris in the twenties and adopted the name Mason. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff — it sounded better.

On tape Masson stated that he wanted to "give back Moussaieff," and that he "just liked it"; it was "sort of part of analysis, a return to the roots, and your family tradition and so on."

In the August 19, 1986 Partial Summary Judgment Order, this Court noted that it could see little difference between Masson's own words and those attributed to him by Malcolm. The article does inform the reader that Moussaieff was a family name, and the slight difference between the phrase "It sounded better" and "I just liked it" is not sufficient

to raise a triable question of fact on the issue of actual malice. The phrase used was a rational interpretation of Masson's own statements.

2. "He Had the Wrong Man"

Masson alleges that Malcolm "willfully distorted the context" of Masson's remark that Dr. Eissler had the "wrong man" if he e pected Masson to "just live with" his firing from the Freud archives in silence.

Masson's remarks in the transcript of the tape-recorded interviews are as follows:

> But it was wrong of Eissler to do that, you know, he was constantly putting various kinds of moral pressure on me, and, "Do you want to poison Anna Freud's last days? Have you no heart?" He called me up, "Have you no heart? Think of what she's done for you, and you are now willing to do this to her." I said, "What am I, What have I done? You're doing it, you're firing me. What am I supposed to do, thank you? Be grateful to you?" He said, "Well, you could never talk about it, you could be silent about it, you could swallow it. I know it's painful for you, but just live with it in silence." *"Fuck you"* I said, "Why should I do that Why? You know, why should one do that?" "Because it's the honorable thing to do, *and you will save face, and who knows, if you never speak about.it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?* Well, he had the wrong man.

The above passage appeared in the article with the emphasized phrases omitted, as follows:

> Eissler had no business extracting that promise from me. He was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? You're doing it. You're firing me. What am I supposed to do, be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.

Plaintiff claims that the quoted passage suggests that he was unwilling to remain silent in order to do the honorable thing; when, in fact, he meant that he was unwilling to remain silent in the hopes of getting his position back. This Court, in its previous order, noted that the quotation and Masson's actual statement are very similar. Although the Court found a triable issue of fact with regard to the quotation's substantial truth, no question of fact exists on the issue of actual malice.

An author has the right to "choose appropriate words and phrases." *Reader's Digest*. 37 Cal. 3d at 264. "Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories . . . . [U]nder the First Amendment the decision of what to select must always be left to writers and editors. It is not the business of

government." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986). Malcolm's omission of Masson's comments, including his use of profanity directed toward Mrs. Freud, was a proper exercise of literary license.

3. "Intellectual Gigolo"

In the article, Malcolm quotes Masson, discussing an affair he had with a graduate student, as stating: "She said, 'Well, it's very nice sleeping with you in your room, but you're the kind of person who should never leave the room -- you're just a social embarrassment anywhere else, though you do fine in your own room.'" This quote appears nearly verbatim in the transcript of the tape-recorded interviews. The article then continues, quoting Masson as remarking: "And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough 'in my own room.' They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public."[5]

Plaintiff suggests that this quote gives the false impression that his intellect and beliefs were for sale. This Court disagrees. The author was attempting to describe Masson's belief that Freud and Eissler enjoyed his opinions and beliefs in private, but would not be associated with those views in public. Malcolm chose to describe this belief by using an analogy to his sexual experience with the graduate student.

5This quote is found in Malcolm's notes; however, because the accuracy of the notes is disputed by plaintiff, they will not be considered.

The descriptive term "intellectual gigolo," as used .in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler.

Masson made several statements to that effect in the tape-recorded interviews. For example:

> MALCOLM: Yeah, well, you know, you said something which I was just reminded of when you were talking, when you quoted that girl who said she liked sleeping with you but she didn't want to have anything else to do with you, when you said something about how the analysts thought you were, uh, that you were this private asset but a public liability.
> MASSON: Yes, yeah, that's true, yeah.
> MALCOLM: So, there was that kind of double standard, like between team-mates, you know, you can . . . horse around together in the privacy of your own home but --

At another point in the interviews Masson commented:

> They felt, in a sense, I was a private asset but a public liability. They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.

Malcolm's use of the descriptive term "intellectual gigolo" was a rational interpretation of Masson's comments. No

reasonable juror could find by clear and convincing evidence that Malcolm entertained serious doubts about the accuracy of this passage.[6]

4. "The Schreber Case"

a. "Discovery"

Freud's study of Daniel Schreber provided evidence for his theory that homosexuality originates from unconscious, paranoid fantasies. Masson contends that Malcolm falsely quoted him as having claimed for himself certain discoveries about the Schreber case, when in fact Masson acknowledged that the discoveries had been made by another analyst, William Niederland. According to Masson, informed readers would know that Niederland had made the discoveries; therefore, the passage portrays him as falsely claiming credit for another's work.

In the article, Malcolm reports Masson as stating:

> It was the same thing with my discovery about the Schreber case. That was even more appalling. I found a 1884 article in Freud's library written by Paul Flechsig, Schreber's psychiatrist, which he had

6Plaintiff also argues that a juror could find Malcolm entertained serious doubts about the accuracy of the passage because the quotation is attributed to a tape-recorded conversation at a restaurant in Berkeley, when in fact Masson did not make the statement at that specific time or place. When or where the statement was made is not a material fact. Malcolm was entitled to put quotes from two different times into the same paragraph, as long as the "gist" or "sting" of the passage was not changed. Distortion of chronological sequence alone is not actionable. *Janklow*, 788 F. 2d at 1305-06.

> personally sent to Freud; reporting that he performed castration experiments on hysterical and obsessional patients in his asylum. This means that when Freud wrote his essay on Schreber he knew that castrations had taken place in the asylum where Schreber was held, but he still could write that Schreber suffered from the *delusion* that the great Paul Flechsig wanted to castrate him.

Masson alleges that, in the tape-recorded interview, he emphasized that Niederland was the one who first discovered Flechsig had performed castrations, and that Masson was only claiming he had gone one step further and discovered Flechsig had sent Freud a copy of his article reporting the castrations. This passage was not alleged by plaintiff in his previous complaints, and was not before the Court at the time of its prior order. If the Court had considered this.statement in the August, 1986 Order, it would have held that it was substantially true. The article makes clear the fact that the discovery Masson was claiming was that Flechsig had sent Freud the article and the article was in Freud's library. Masson's interpretation of the passage is disproved by the plain meaning of the words used. No reasonable juror could find by clear and convincing evidence that Malcolm entertained serious doubts about the truth of the printed material.

b. "Moral Cowardice"

Masson also claims, in his opposition to defendants' motion for summary judgment, that Malcolm falsely quoted him as accusing Freud of moral cowardice. This allegation is

not contained in plaintiff's Fourth Amended Complaint, and thus may not be considered. Even if this Court were to consider the claim, it has no merit. The statement Masson complains of is as follows:

> I think Freud was a great and remarkable thinker, but he wasn't honest. He was a man who just lost his courage. His entire theory after he abandoned seduction was the product of moral cowardice, because Freud knew that Schreber was in an asylum where they were trying to castrate him, and he never mentions it.

The tape transcript contains numerous references to Freud's dishonesty and lack of courage regarding the Schreber case. For example, Masson states: "I think he was a great and remarkable thinker but he was still a, a, a man who just lost his courage. He was a brilliant mind who didn't have the courage to stick with things that he knew were true." Later in the transcript Masson remarks: "It's not honest in the end . . . . And it was the first piece ever written on the psychology of homosexuality . . . . It's a brilliant and convincing thesis. And it's dishonest." At another time, Masson emphasizes: "And that's dishonest, too, you see. Time and time again, Freud is dishonest." Malcolm's article accurately reports Masson's views about Freud regarding the Schreber case. Her use of the descriptive phrase "moral cowardice" was a rational interpretation of Masson's comments.

c. "There Aren't Too Many Interpretations Possible"

Masson next claims that Malcolm took his statement, that there aren't too many interpretations possible of his discovery, out of context and furthered the false image of Masson as a vain egotist by falsely quoting him as saying that Eissler would have admitted Masson was right. The passage as it appeared in the book is as follows:

> "There aren't too many interpretations possible of my discovery," Masson said grimly. "I think Eissler would have admitted that I was right. I think if I had said to him, 'Look I'm never going to make this public — this is just between you and me — but just take a look at this,' he would have said, "Yes, you're right. But never, never tell the goyim.'"

In the transcript, Masson discusses two discoveries he made regarding the Schreber case. The first discovery was that Freud had the article from Flechsig in his possession and therefore presumably knew that Flechsig was performing castrations. The second was that Freud had written a letter to another person acknowledging that Schreber's father was a "tyrant." The significance of the second discovery was that Freud had written in his article that Schreber suffered from delusions about his father. According to Masson, Freud stated that Schreber's father was a wonderful physician when he knew that the father was a vicious tyrant.

The disputed portion of the article discusses only the first discovery, and quotes Masson as claiming that Eissler would agree with him about that discovery. The transcript, in fact, contains the following comment by Masson regarding his

discovery of Freud's possession of the Flechsig article: "What will Eissler do with it? What will he say in excuse? Cause he will find an excuse. He'll say, 'It's perfectly normal that Freud didn't mention it.'" Masson points to this quote in support of his claim that the article, which quoted him as claiming Eissler would agree with him, is defamatory.

However, another part of the transcript contains the following conversation:

> MASSON: He [Freud] could say: I have here in my library an article by Paul Flechsig, in which he recommends castration. Now, you may wonder whether this had anything to do with Flechsig, with Schreber's delusions. My answer is: It did not.
> MALCOLM: Uh huh.
> MASSON: And it leaves the reader the opportunity to think about it by providing evidence he knew to be germane to the issue, but Freud doesn't do that . . . . I even wrote in my Schreber paper when I -- the one that I met with Eissler over, I said, "I cannot believe that Freud knew the works of the father. I simply do not believe he knew them because if he did, he wouldn't be able theoretically to ignore this and -
> MASSON: Now, I know that's not true.
> MALCOLM: So what did Eissler say then?
> MASSON: He agrees with me, of course.

In another part of the tape-recorded interviews, Masson and Malcolm have the following interchange:MASSON: Not my views because they're really the views that he would have shared. I mean if I could've had enough time with

Eissler looking at these documents, he would have said, "You're right, but let's hever tell anybody. Let's —"

> MALCOLM: You mean he, he would've -- But he seemed to disagree that the, the seduction theory was, was correct. He kept saying, "No, it's wrong and he knew that Freud knew it was wrong and --"
> MASSON: Yeah but if, I mean if he had let me talk to him long enough about all the new material, he would've had to share more or less my point of view.
> MALCOLM: Um-hmm. You really think so?
> MASSON: Oh yeah.
> MALCOLM: You think you could have persuaded him? MASSON: Oh yeah, oh yeah . . . . . .
> MASSON: But it, yeah, but I don't think there are too many interpretations possible of this kind of material. You know it's just overwhelming the amount of, of information that's been suppressed and so on . . . .
> MALCOLM: Yeah, I see.
> MASSON: You know and I think Eissler would have admitted that. I think if I had said to him: "Look, you know, I'm not going to ever say this, but just between you and me --," he would've said, "Yes, you're right, but never, never tell the goyim."

Masson claims that the "material" mentioned in the above-quoted passage refers only to omissions from published Freud letters. However, in light of the somewhat confusing references to "discoveries" and "new material" in the transcript, plaintiff's statements quoted above could

reasonably be seen as pertaining, at least in part, to plaintiff's discovery about the Flechsig article. The published passage was a rational interpretation of a series of ambiguous conversations with Masson, and cannot support a finding of actual malice.

5. "I Don't Know Why I Put It In"

Masson wrote a paper and delivered it to a group of psychoanalysts. The concluding paragraph of that paper blamed Freud for the sterility of psychoanalysis. Masson claims Malcolm falsely quoted him as stating: "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in."

Malcolm maintains, in her declaration, that she remembers Masson making that comment; however, the phrase "I don't know why I put it in" is not contained in the transcript. Masson admits that the subject of the last paragraph came up often, but he emphasizes the fact that he told Malcolm on many occasions that he put the last sentence in because he really believed it was true.

Masson did, however, admit that the last paragraph was "unfortunate, and poorly worded." In the transcript, Masson also comments: "I think the last sentence was, an in, possibly gratuitously offensive way to end a paper to a group of analysts." He also stated: "I don't know why psychoanalysis is sterile today."

The "sting" of the quoted passage is that Masson made the remark with little thought and on the spur of the moment. The definition of "gratuitous," a word Masson used in the taped interview to describe his decision to include the

remark, is: "being without apparent reason, cause, or justification . . . spontaneous . . . ." *The Random House College Dictionary* 576 (rev. ed. 1982). It is also defined as: "not called for by the circumstances . . . adopted or asserted without good ground." *Webster's Third New International Dictionary* 992 (1981).

Malcolm asserts in her declaration that she conveyed what she believed Masson meant to convey, that it was an impulsive decision. The passage as written is a rational interpretation of Masson's comments, including his characterization of the last sentence as a gratuitously offensive way to end the paper. No reasonable juror could find that this passage provides clear and convincing evidence that Malcolm entertained serious doubts as to the truth of the statement.

Masson also complains that Malcolm accused him in the article of being silent and "sidestepping" her question about his change into an anti-Freudian. Malcolm wrote that she "asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst . . . into the bitter and belligerent anti-Freudian he had become. Masson sidestepped my question." Later in the article, Malcolm noted:

> At no time during our acquaintance did Masson answer my question about what had brought on his sudden virulent anti-Freudianism. As I came to realize, it was not the right question -- as is probably the case with all unanswered (unanswerable) questions . . . . But if Masson was silent about -- and possibly ignorant of - psychoanalytic volte-face, he was anything but

reticent about the reversal of his fortunes that the Blumenthal articles brought about.

Malcolm, in her declaration, justifies her use of the terms "silent" and "sidestepped" as follows:

> The . . . passages convey my opinion that Mr. Masson gave no single, simple, satisfactory explanation for his evolution from a Freudian into an anti-Freudian, and that on many occasions he sidestepped my question . . . . I also believe -the article -- that the question is probably *unanswerable* . . . . I tried to, and did, give much of Mr. Masson's explanations of his views. But while Mr. Masson went on at great length about his views of, and condemnation of, Freud and the Freudian school, he never, at least in my opinion, gave a satisfactory explanation of what caused the transformation in his views.

Malcolm's characterization of Masson as silent and of sidestepping her question are clearly constitutionally-protected expressions of opinion. *See Baker v. Los Angeles Herald Examiner*. 42 Cal. 3d 254, 263 (1986); *see also Janklow*, 788 F.2d at 1304 ("colorful, even feisty language used in magazines "signal[s] the reader to expect a fair amount of opinion"). The phrase "but if Masson was silent" is cautionary language signaling opinion. *Id.* at 1302.

6. "Denise Worries Too Much"

Malcolm described a conversation that took place during

lunch among Masson; his girlfriend, Denise; and his daughter, Simone. Malcolm did not tape-record that conversation, but she subsquently made notes on, and tape-recorded two further conversations on the same topic: Denise's concern about Masson's apparent indifference to the hurt feelings of Eissler and Gardiner. The passage in the article is as follows:

> During lunch, Denise suddenly turned to Masson and said emotionally. "Those old people -- Eissler and Muriel Gardiner -- I worry about them. I feel their pain . . . . You touched Eissler, and you hurt him. I see him bearing the pain. But you don't feel it, Jeff. You just don't feel it. I worry about that." "Denise worries too much," Masson said imperturbably.

Masson does not dispute the conversation took place, but he claims he did not make the statement, "Denise worries too much." He argues that the quote was fabricated to make him appear careless and indifferent to the feelings of those he loved. Malcolm, in her declaration, claims that she remembers Masson making the comment. Her interpretation of the quote is that it was Masson's way of saying that Denise did not fully understand the complex situation between himself and Eissler.

In this Court's opinion, plaintiff's allegation regarding this passage is triviality to the highest degree. It is doubtful that the quote is even defamatory. "A publication is not responsible for every strained interpretation a plaintiff might put on its words." *Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 127 (1985) (quoting *Forsher v. Bugliosi*,

26 Cal. 3d 792, 803 (1980)). Courts should not engage in "hair-splitting analysis" in search of a possible defamatory meaning. *See Mullins v. Thieriot.* 19 Cal. App. 3d 302, 304 (1971). Even if this quote were found to be defamatory, plaintiff has presented no clear and convincing evidence that Malcolm entertained serious doubts about the truth of the statement. Masson admitted that this topic was discussed several times; he also admitted that he has, in the past, stated his belief that Denise worries too much.

7. "Sex, Women, Fun"

The article quotes Masson as saying that if he had moved into the Freud house, the house would have not only been "a place of scholarship, but it would also have been a place of sex, women, fun." In its August 19, 1986 Order, the Court found that this disputed passage was substantially true because the sting of the passage is the same as that of undisputed tape-recorded passages. Plaintiff now urges this Court to reconsider its ruling based upon newly-discovered evidence. Plaintiff claims that Malcolm represented to the *New Yorker* magazine attorneys that the phrase was on tape, when in fact it was not. Plaintiff further points out that the original manuscript contained the correct quote, but Malcolm crossed it out and substituted the disputed phrase.

This new evidence has no bearing on whether the phrase legally was substantially true. This Court, for the purposes of this motion, can assume that Masson did not use precisely those words. That assumption does not change the Court's prior conclusion that a fair-minded jury would have to conclude that the "sting" of the passage was substantially true and that its inclusion in the artcle could not have created

a false impression affecting the overall "gist" of the article so as to render it false.

8. "The Greatest Analyst"

The final, and most problematic, disputed passage appears in the article as follows:

> A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux had taken *The Assault on Truth*. "Wait till it reaches the best-seller list, and watch how the analysts will crawl. They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst -- after Freud, he's the greatest ana' st who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now."

Malcolm asserts that the source of the above-quoted passage was a conversation she had with Masson during his visit to New York. She claims she took notes of that conversation because her tape-recorder was broken, and later typed her notes. Plaintiff, of course, claims the conversation

never took place at all. The alleged "sting" of the passage is that it portrays Masson as a grandiose egotist and full of braggadocio.

Ignoring the type-written notes, which plaintiff disputes, this Court notes that many similar egotistical statements appear in tape-recorded portions of the interviews. For example, Masson and Malcolm did have the following tape-recorded exchange:

> MASSON: Yeah but I've become, *for better or for worse, analysis stands or falls with me now.*
> MALCOLM: Well that's a very grandiose thing to say.
> MASSON: Yeah, but it's got nothing to do with me. It's got to do with the things I discovered.
> MALCOLM: Well, whatever, that's still a . . . thing and, and I'm not there yet.
> MASSON: Well, you'll see.
> MALCOLM: I can't think in this global yet. Maybe I will --
> MASSON: You will.
> MALCOLM: -- after I've talked to a few more -
> MASSON: Maybe you won't until you've written the article and see the reaction but it will, analysis is either going to face this kind of stuff that I've found, which are historical documents, and change or they're going to deny them and they're going to become destroyed.

(Emphasis added).

Masson also stated:

> I mean, just --You're going to hear it. Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world . . . . Not so, it's me. It's me alone.

Regarding his book, Masson commented: "I've got to soon sit down and, you know, work ten hours a day on my book because it's everything, everything hangs on that book." He also boasted:

> [M]y feeling is if I don't have one [a publisher], fuck them. I'll let the book come out in Europe and they'll be sorry, you know, it'll create all this storm and a lot of attention, and then they'll come to me and say, 'Well, we'll pay you this, that and the other,' and then I can pick and choose.

Masson also told Malcolm that psychoanalysts hated him and were envious of him. He said that they felt he was a potential danger to psychoanalysis. "They sensed that. And they were right. 'This man could single-handedly bring down the whole business." Masson predicted a strong reaction to his book, stating:

> I don't really know what the analytic reaction will be when they actually see this stuff in cold print but I know that it's not going to be a minor one, I

> mean, they're going to get really upset and especially in the new version . . . . [I]t's just more, in a way uncompromising. It doesn't let you go.

On several occasions in the tape-recorded interviews Masson commented on the fact that his findings and discoveries could not be contradicted. He stated:

> [W]hen this book comes out . . . I really feel it spells the beginning of the end of psychoanalysis, and he's definitely going to blame me, as will every other analyst in the world for having done psychoanalysis an irreparable damage. But what they'll say beyond that is still a puzzle to me, how they're going to reinterpret the documents I've found so that it, on the contrary . . . enhances. Freud's image is totally mysterious to me. Undoubtedly they will try that. But I don't think they're going to fool the whole public . . . . I think that this book really is, uh, it's the end for them.

On another occasion, Masson told Malcolm:

> [W]hat I'm showing in all my work is that Freud said so for reasons that are not honest, and that's why analysts are so upset by it. Because if I am right, and it's very hard to prove that I am not, then they've got to say, "My God, what the hell have I been doing all these years to my patients?"

Masson described his book as "historical stuff," and claimed that "sooner or later it's going to be recognized. I

mean cause it's not my opinion."

In light of the many egotistical and boastful statements that Masson made in tape-recorded comments regarding his book and his position in the world of psychoanalysis, this Court finds that plaintiff has not demonstrated clear and convincing evidence from which a reasonable jury could conclude that Malcolm entertained serious doubts about the accuracy of the passage.

B. Claims Against The New Yorker Magazine and the Publisher

As discussed above, no clear and convincing evidence exists to support a finding that the writer of the article entertained serious doubts about the truth of any of the disputed passages. Plaintiff bases his claims against *The New Yorker* magazine upon a theory of vicarious liability. Obviously, given this Court's finding that Ms. Malcolm is not liable, her employer cannot be vicariously liable. Furthermore, there is no evidence that *The New Yorker* entertained actual malice. The editor-in-chief, the copy editor, and the fact checker relied on Malcolm's word that she had reported Masson accurately. Malcolm had been a writer for the magazine for twenty years, with no prior complaints registered against her for misquotation. Publishers do not have to investigate personally, "but may rely on the investigation and conclusions of reputable sources. 'Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate.'" *Reader's Digest*, 37 Cal. 3d at 259 (quoting *Bindrim v. Mitchell*. 92 Cal. App. 3d 61, 73 (1979)).

These principles of law also operate to relieve defendant Knopf, the publisher of Malcolm's book, of liability. Plaintiff alleges that, prior to publication, the president of Knopf was aware that Masson was challenging the accuracy of the *New Yorker* article. While knowledge of complaints or the threat of a suit "might well give a publisher pause . . . it would not necessarily lead it to doubt the truthfulness of its article or its sources." *Reader's Digest*. 37 Cal. 3d at 260. Defendant Knopf was entitled to dismiss plaintiff's complaints as nonmeritorious based upon the word of a well-respected, reliable author.

IV. CONCLUSION

As discussed above, each of the alleged defamatory statements is either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations. No clear and convincing evidence exists that would justify a finding that the writer or the publishers entertained serious doubts about the truth of the disputed passages. Accordingly, judgment must be entered against plaintiff and in favor of all

defendants on plaintiff's claims of defamation and invasion of privacy.[7]

IT IS SO ORDERED.
DATED: August 14, 1987

Euguene F. Lynch
United States District Judge

[7]Plaintiff agrees that this Court must apply the same standard, requiring clear and convincing evidence that defendants entertained serious doubts about the truth of the article, to his claim for invasion of privacy. Therefore, that claim falls along with the defamation claims.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[No. C-84-7548 EFL; August 19, 1986]

JEFFREY M. MASSON,
Plaintiff

v.

THE NEW YORKER MAGAZINE, INC.;
ALFRED A. KNOPF, INC.; JANET MALCOLM
Defendants

PARTIAL SUMMARY JUDGMENT

INTRODUCTION

This is an action for libel brought by Jeffrey Masson and arising out of an article by defendant Janet Malcolm entitled "Trouble in the Archives," which was based in part upon extensive tape-recorded interviews given to Malcolm by Masson. The article appeared in two parts in successive issues of *The New Yorker* magazine in December 1983. In 1984, it was published by defendant Alfred A. Knopf, Inc. as

1984, it was published by defendant Alfred A. Knopf, Inc. as a book entitled In the Freud Archives.[1] Masson claims that he was misquoted in such a manner as to constitute defamation.

Malcolm's article deals in significant part with the story of how Masson quickly became relatively prominent within the psychoanalytical "establishment"; how he was later rejected by his colleagues; how he rebelled against his former benefactors; and how he discovered information leading him to a conclusion that he claims would result in the destruction of psychoanalysis.[2]

Currently before the Court is defendants' motion for summary judgment. In their motion, defendants do not raise every argument upon which this Court could possibly grant summary judgment in their favor.[3] Instead, they assert that each of the seven passages of the article Masson alleges contain false quotations of him are substantially true and that the article viewed as a whole is a substantially true depiction of Jeffrey Masson as he portrayed himself to Janet Malcolm

[1] The article and book are substantially identical in content; for purpose of this order no distinction is drawn between them or between their respective publishers, and they are referred to herein as "the article."

[2] The Court's description of the article is provided merely for purposes of introducing the issues currently pending before the Court. This description, based on the defendants' characterization of the article, is not intended to reflect a thoroughly reasoned interpretation by the Court of the "gist" of the article.

[3] The defendants have requested the Court to review only the limited issue of whether the article or any of the passages relied on by Masson in asserting his claims is substantially true. In doing so, they expressly reserved other defenses they may have to Masson's claims. Without expressing any opinion as to the merits, the Court encourages defendants to pursue, by way of summary judgment, their other possible defenses. These defenses should be tested by a summary judgment motion before trial.

during their interviews.[4] In asserting truth as a defense, defendants rely on transcripts of numerous tape-recorded discussions between Masson and Malcolm.[5]

For the reasons given below, the Court grants partial summary judgment in favor of the defendants. The Court holds that the defendants are entitled to judgment in their favor as a matter of law on the issue of whether four of the seven passages identified in the complaint could provide a basis for determining that the article as a whole is not substantially true. Masson has failed to raise a genuine issue of any material fact with regard to the substantial truthfulness of these passages independently or in the context of the article. In all other respects, defendants' motion for summary judgment is denied.

I. Issues Presented and Applicable Law

The parties do not disagree on the law applicable to defendants' assertion of truth as a defense. "Under California law, a defendant can defeat a libel action by proving that the allegedly libelous publication, although not literally true in

[4] In the opposition papers, Masson states that the specific statements identified in his complaint are mere examples of Malcolm's distortions. This statement is inconsistent with this Court's previous rulings requiring the plaintiff to specifically identify each passage in the article upon which Masson relies in asserting that the article is libelous. The Court has been generous in allowing Masson the opportunity, through amendments to the complaint, to plead his case. The Court will not allow attempts by Masson to amend his complaint de facto by characterizing his previous pleadings as containing mere examples of actionable statements.

[5] Masson has not challenged the accuracy of his statements in the transcripts relied on by the defendants.

every detail is substantially true in its implication, that is, that the 'gist' or 'sting' of the article, read as a whole, is true." *Alioto v. Cowles Communications. Inc.*, 623 F.2d 616, 619 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *see also Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 160 (1943). In *Kurata v. Los Angeles News Publishing Co.*, 4 Cal. App. 2d 224, 228 (1935), the Court stated that a publication is only actionable if it "change[s] the complexion of the affair so as to affect the reader of the article differently than the actual truth would." *Id.*; see also *Readers Digest Association v. Superior Court*, 37 Cal. 3d 244, 262 (1984), *cert. denied*, 106 S. Ct. 330 (1986).

The contested issue is whether given the undisputed statements by Masson in the transcripts and the legal principles described above, this Court may hold as a matter of law that that the article, read as a whole, is substantially true. Defendants make two arguments in favor of a finding that the article is substantially true: (1) that each of the passages from the article that are relied on by Masson in asserting that the article is libelous is substantially true, and (2) that, even assuming some of the passages are not substantially true, the overall gist or sting of the article is the same as that of Masson's own words as recorded in the transcripts. Masson disputes both of the defendants, claims and further argues that, in any event, questions of the substantial truthfulness of an allegedly libelous publication are for a jury to decide.

Masson is correct in his contention that generally "the effect produced by the particular words used in an article . . . is a question of fact for the jury." *Handelsman v. San Francisco Chronicle*, 11 Cal. App. 3d 381, 386 (1970); *see also Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49

Cal. App. 3d 186, 194-96 (1975). However, such is not always the case. The United States Supreme Court as recently stated as follows:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., slip op. at 9 (June 25, 1986). Consequently, even though the issue of substantial truthfulness is typically one for the jury, this Court may hold as a matter of law that the article is substantially true if it can conclude on the evidence presented that such a conclusion is the only one that could be reasonably reached by a fair-minded jury. This standard of review is consistent with the treatment given summary judgment motions in California courts on libel issues traditionally involving jury questions. *See, e.g., Reader's Digest*, 37 Cal. 2d 244 (holding that summary judgment should have been granted on the issue of malice).

Masson also challenges the propriety of the defendants' attempt to prove that the article as a whole is substantially true by asserting that each of the individual passages is substantially true. In support of this challenge, Masson

argues that "[t]he literal accuracy of individual statements will not insulate a defendant from liability where the overall impression left by those statements is false . . . . [T]rue facts that in context imply a falsehood are, in an action for defamation, not true." *Coughlin v. Westinghouse Broadcasting and Cable*, 603 F. Supp. 377, 385 (E.D. Pa.), *aff'd*, 180 F.2d 340 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2927 (1986).

Masson's assertion that "true facts" can be used to imply an actionable falsehood is accurate. Moreover, California courts have recognized that "an alleged libelous article must be considered in its entirety and cannot be divided into separate units . . . ." *Handelsman*, 11 Cal. App. 3d at 388. Nevertheless, this principle does not render irrelevant the question of whether the specified passages are substantially true. At the pleading stage, this Court required Masson to identify each passage in the article upon which he bases his claim that the article as a whole is libelous. If the Court can conclude that some or all of these passages are substantially true and do not create a false impression in the context of the article as a whole, then full or partial summary judgment is appropriate. See *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 925-27 (C.D. Cal. 1982) (granting summary judgment because the allegedly actionable statements were each either opinions or substantially true); *cf. Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1050 (S.D.N.Y. 1975), *aff'd* 538 F.2d 309 (2d. Cir. 1976) (considered the accuracy of individual quotations in deciding whether the publication was a true and fair comment).

The propriety of testing the truthfulness of the entire article by reviewing each of the allegedly false statements contained therein is underscored by Masson's allegations.

Masson asserts that the article is libelous because a number of passages therein contain false quotations of him. Masson has not shown how the article as a whole would not be substantially true if each of the passages he has identified as rendering the article false were shown both to be substantially true and not to create a false impression.

II. Substantial Truthfulness of Each of the Passages

A. "Sex, Women, Fun

The article quotes Masson as saying that if he had moved into the Freud house, the house would have not only been "a place of scholarship, but it would also have been a place of sex, women, fun." The clear gist of the quotation is that, while he intended to make the Freud house a place of scholarship, Masson also intended to dramatically and somewhat mockingly change the complexion of the Freud house. Although the quoted passage does not appear in the transcripts, other statements therein clearly are consistent with the gist of the passage. On numerous occasions, Masson spoke of his sexual exploits and of plans to pass women around. In discussing the changes he would make in the Freud house, he noted that "They're going to be calling the police on me every, every time I give a party or something"; that "I could have had some fun"; and that "it would take, it would take an Act of Congress then get me out of Anna Freud's house. And I could have a lot of fun while they tried. But sooner or later, the, i—, there, there would have been, you know, just a rising, uh, tide of anger and resentment and people demanding my resignation. But the only person they could demand it of was me. And as

long as I wanted to I could say, 'Go to hell.'" Based on the undisputed statements by Masson, the Court concludes that a fair-minded jury would have to conclude that the "sting" of the passage was substantially true and that its inclusion in the article could not have created a false impression affecting the overall "gist" of the article so as to render it false.

B. "It Sounded Better"

The articles contains the following passage:

> My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too - a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Mason, but in 1975 I decided to change my middle name to Moussaieff — it sounded better.

Masson asserts that this statement is false because he actually stated, after explaining that his grandfather changed his name to hide his Jewishness, that Masson changed his name because "I just liked it . . . . You know, it was sort of part of analysis: a return.to the roots, and your family tradition and so on." Masson asserts that Malcolm's quote of Masson is false because it removes the reasoning given by Masson for the change and thereby makes him look "whimsical or narcissistic." While the Court sees little difference between Masson's own words and those attributed to him by Malcolm, it cannot say as a matter of law that a fair-minded jury would ascribe the same gist or sting to both and, as a consequence, determine that this and other

allegedly false quotations rendered the article as a whole false.

C. "Get the Most Effect"

Masson asserts that Malcolm falsely quoted him as saying that he would wait to resign from the International Psychoanalytic Association "until I can get the most effect out of it." These words appear almost verbatim in the transcript and, as a consequence, the quotation is substantially true as a matter of law. It would be impossible for a fair-minded jury to conclude that the gist or sting of the quoted statement differs from what Masson actually said or that its inclusion in the article could have adversely affected the truthfulness of the article .

D. "Not Going to Give . . . Back"

The article quotes Masson as having said to Dr. Kurt Eissler that Masson was "not going to give . . . back" original letters of Sigmund Freud in Masson's possession following Eissler's request that he do so. Masson's complaint alleges that this quotation is false. The transcripts contain statements by Masson indicating that Eissler and Masson did have such an exchange:

> Masson: Anyway, he [Eissler] said, "I want my tapes back," and I said, "Too bad. I'm not going to give them." And, "I want all the letters back." "I'm not giving those either."

Masson contends that Malcolm's omission from the article of the fact that Masson also told Malcolm that he "never made the decision that [he] wouldn't give it back" and that "my idea really at the time was that I wanted to make certain that anything that was really important for my research that I could use" made the quotation false. The Court disagrees. Malcolm's failure to state Masson's motivation for the statements he himself said he made does not make Masson's near verbatim quotation of those statements false. Neither the passage itself nor any other language in the article changes whatever "gist" or "sting" a reader could ascribe to Masson's own description of his exchange with Eissler. "A publication is not responsible for every strained interpretation a plaintiff might put on its words." *Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 127 (1985). Given that Malcolm's inclusion of the exchange in the article did not create a false impression regarding what Masson's motivation for making the statement might have have been, her failure to include Masson's explanation to her for saying what he indisputedly said could not render the article false.

Masson also argues that the statement is not substantially true because it was not actually made in a telephone conversation with Eissler, as represented in the article, but was made in a meeting with Eissler where others were present. The Court finds no basis upon which a jury could find that this fact changes the gist or sting of the article.

E. "The Wrong Man"

Masson asserts that Malcolm distorted certain of Masson's remarks regarding a discussion Masson had with

Dr. Eissler regarding Masson's termination from the Freud Archives.

Masson's remarks in the transcript are as follows:

> Masson: But it was wrong of Eissler to do that, you know, he was constantly putting various kinds of moral pressure on me, and, "Do you want to poison Anna Freud's last days? Have you no heart?" He called me up, "have you no heart? Think of what she's done for you, and you are now willing to do this to her." I said, "What am I, What have I done? You're doing it, you're firing me. What am I supposed to do, thank you? Be grateful to you?" He said, "Well, you could never talk about it, you could be silent about it, you could swallow it. I know it's painful for you, but just live with it in silence." "Fuck you," I said, "Why should I do that? Why? You know, why should one do that?" "Because it's the honorable thing to do, and you will save face, and who knows, if you never speak about it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?" Well, he had the wrong man.

The above passage appeared in the article as follows:

> Eissler had no business extracting that promise from me. He was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? You're doing it. You're firing me. What am I

supposed to do, be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.

While Masson's actual statement and Malcolm's quotation of it are very similar, the Court cannot hold as a matter of law that the quotation is substantially true. A jury could reasonably conclude that the gist or sting of the two passages is different. A fair-minded jury could, for example, conclude that Masson's remarks indicate that he was unwilling to remain humbly silent simply to avoid personal embarrassment or in the hopes of getting his position back while Malcolm's quotation indicates an unwillingness on Masson's part to sacrifice his own interests for the benefit of Anna Freud. If such a conclusion were reached by the jury, the jury could also find that the quotation had a material effect on the truthfulness of the article as a whole.

F. "Not Be Bound"

Masson's complaint alleges that Malcolm "distorted the context of Masson's remarks by quoting Masson as having told *The New York Times*, *Time* and *Newsweek* that he would 'not be bound' by a promise made to the Board of Directors of the Sigmund Freud Archives not to 'reveal anything that happened' at the meeting of the Board during which Masson was terminated as Projects Director of the Archives, implying that Masson had not informed the Board of his intention to speak to the news media. In fact Masson

told the Board before he told the news media that he would not be bound by any promise not to reveal what transpired at such meeting."

Masson admits in the complaint that he made the above-described statement to the press. His only basis for asserting that Malcolm's quotation of it is false is his claim that the quotation falsely implied that Masson had not previously informed the Board that he was not going to honor his promise. The Court finds no evidence to support this assertion. The quotation does not contain such an implication; instead, it merely indicates that Masson told the press that he had made a promise of silence and that he would not be bound by it. The truthfulness of this statement is admitted and its inclusion in the article could not have created any false impression upon which a challenge to the overall truthfulness of the article could be based. "An innuendo . . . cannot ascribe a meaning to assertedly defamatory matter other or broader than the words themselves naturally bear; it cannot add to, enlarge, or change the sense of the published words. *Emde v. San Joaquin County*, 23 Cal. 2d 146, 160 (1943); cf. *Janklow v. Newsweek*, 759 F.2d 644, 648 (8th Cir. 1985) ("liability may be imposed in a libel case only for an assertion or implication of fact that is false and unprivileged, and not for mere omission of a relevant fact"); *Blatty v. New York Times*, 175 Cal. App. 3d 571, 581 (1985) (quoting *Janklow*).

G. "Greatest Analyst"

Masson alleges that Malcolm falsely stated that after she returned to New York following the conclusion of her interviews with Masson, Masson made a number of

statements to her including the statement that after publication of Masson's book, other analysts would say that "after Freud, he's [Masson is] the greatest analyst who ever lived."

There is no evidence in the transcripts indicating that this specific conversation between Malcolm and Masson ever took place. Similarly, the actual quote attributed to Masson is not contained in the transcripts. Defendants argue that the gist or sting of the quotation is nevertheless true because the transcripts contain numerous examples of Masson's high personal opinion of himself. The Court finds no basis for holding as a matter of law that the quotation is substantially true on the basis that the gist of this statement is the same as other unrelated statements indicating that Masson was an egotist. A fair-minded jury could reach more than one conclusion on this issue. Consequently, it is one for a jury to decide.

III. Truthfulness of the Article As a Whole Based on the Gist of Masson's Recorded Statements

In addition to the more specific arguments directed at each of the allegedly false passages, defendants argue that the article read as a whole is substantially true because the gist or sting of the article is consistent with that of Masson's own words as recorded by Malcolm during the interviews. In short, defendants assert that to the extent the article makes Masson appear unscholarly, irresponsible, vain, and lacking in honesty, integrity, and credibility, it is substantially true because that is the gist or sting of other statements made by Masson in the transcripts. While this may ultimately be true, it certainly is not true as a matter of

law. After carefully reviewing all the materials submitted, the Court simply cannot conclude that a fair-minded jury could reach but one conclusion on the issue. The Court agrees that Masson's own words may suggest that some or all of the above attributes are applicable to him, but it cannot say that a fair-minded jury would have to conclude that the gist or sting of those words is the same as the article, which allegedly contains quotations falsely attributed to Masson by Malcolm.

SUMMARY

In accordance with the foregoing, the Court grants summary judgment in favor of the defendants on the issue of whether the alleged false passages referred to in paragraphs 14(a), (c), (d), and (f) of Masson's complaint raise a triable issue of fact regarding the substantial truthfulness of the article as a whole.

IT IS SO ORDERED

DATED: August 15 , 1986

EUGENE F. LYNCH
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Nos. 87-2665, 87-2700; February 15, 1990]

JEFFREY M. MASSON,
Plaintiff /Appellant/Appellee

v.

THE NEW YORKER MAGAZINE, INC.;
ALFRED A. KNOPF, INC.; JANET MALCOLM
Defendants/Appellees/Appellants

ORDER

The opinion filed August 4, 1989 is amended as indicated below:

1. Slip opinion at 8761, delete ellipsis in last paragraph and add "686 F. Supp. at 1407" after last sentence.

2. Slip opinion at 8762, insert the following before the first paragraph:

The California Civil Code states: "Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45 (West 1982). In suits brought by public figures, California courts have limited recovery of damages under the statute to cases in which the plaintiff can demonstrate that the defendant published the falsehood with actual malice, as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "[T]he *New York Times* decision superimposed a constitutional standard on the common law of libel. If the person defamed is a public figure, [he must prove] that the libelous statement was made with '"actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Readers' Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 256, 208 Cal. Rptr. 137, 144, 690 P. 2d 610 (1984) (quoting *New York Times*, 376 U.S. at 279-80, 84 S. Ct. at 725-26). In interpreting the actual malice standard, California courts have looked to federal precedent, *See McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 860-71, 231 Cal. Rptr. 518, 534-42, 727 P.2d 711 (1986) (drawing on federal applications of the *New York Times* standard). Because this is a diversity action, we must follow the California Supreme Court's practice of using both California and federal decisions to define actual malice in determining whether summary judgment was appropriate. Our decision, however, ultimately rests

on whether the statements at issue constituted malice as a matter of federal constitutional law.

3. Slip opinion at 8763, replace first paragraph with the following:

> Neither the United States Supreme Court nor the California Supreme Court has had occasion to address the question whether a finding of malice may hinge upon evidence showing that a defamatory statement attributed to a person by using quotation marks does not contain his or her exact words. One California appellate court, however, has addressed the question, as have several federal courts of appeals.

4. Slip opinion at 8765-66 move two paragraphs beginning "In *Bindrim v. Mitchell*" and ending "(footnotes omitted)1" to slip opinion at 8763 after first paragraph.

5. Slip opinion at 8767 n.1 change "*supra* at" to *infra* at."

6.Slip opinion at 8768 change "verbatum" to "verbatim"

7. Slip opinion at 8786 change "the law in California and in this circuit was unclear whether" to "it was unclear whether."

With the opinion thus amended, Judges Alarcon and Hall have voted to deny the petition for rehearing. Judge Kozinski has voted to grant the petition for rehearing. The panel has voted unanimously to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The dissent remains as is.

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QUESTIONS PRESENTED

1. Whether actual malice can be inferred when quotations attributed to a public figure libel plaintiff do not alter the substantive content of remarks indisputably made by the public figure, or are rational interpretations of ambiguous remarks made by the public figure.

2. Whether the two federal courts below were correct in finding that the public figure libel plaintiff could not show actual malice under the standard articulated in *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986).

CERTIFICATE PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Supreme Court Rule 29.1, respondents provide the following information on the corporate parties and their parent corporations.

The New Yorker Magazine, Inc., Respondent

Alfred A. Knopf, Inc., Respondent

The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., are owned, through intermediate corporations, by Advance Publications, Inc. All are privately held corporations.

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No. 89-1799

In the Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY M. MASSON,
Petitioner

VS.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. AND
JANET MALCOLM,
Respondents

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INTRODUCTION—SUMMARY OF ARGUMENT

Petitioner, an outspoken public figure, has charged, through five different complaints, two courts, and six years of litigation, that a serious writer "fabricated" quotations with actual malice. The two courts have needed to consider only a portion of respondents' evidence—disregarding the writer's notes but considering a 1,056-page transcript of tape-recorded interviews—in rejecting petitioner's claims. These courts have carefully examined the facts of this case and simply applied existing law to them. Petitioner now asks this Court to discard or ignore both its own precedents and the holdings of lower courts for the purpose of ruling that *any* departure from full verbatim quotations—even one that does not change the substance of what was said—should expose both writer and publisher to liability. This Court, like the lower courts, should reject petitioner's far-reaching theory and deny the Petition.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff and petitioner Jeffrey Masson (hereafter "petitioner" or "Masson") is an outspoken and admitted public figure in the field of psychotherapy. He has levelled harsh public criticism at Sigmund Freud, many Freudian scholars, and what he calls the Freudian "establishment." In 1980, Masson was hired as the projects director of the Sigmund Freud Archives. In 1981, a series of long articles appeared in the *New York Times* about Masson's novel theories that were based on his research into Freudian analysis and history. (Janet Malcolm's Declaration in Support of Defendants' Summary Judgment Motion, District Court Clerk's Record [hereafter "CR"] 95, at ¶4.)

Shortly thereafter, Masson was fired by the Board of Directors of the Freud Archives. His dismissal was also reported in the *New York Times*. (CR 95, ¶ 4.) Masson's theories about psychoanalysis and his outspoken criticism of Freud and of Freudian scholars and practitioners form much of the backdrop for the *New Yorker* articles and the Knopf book at issue in this case.

Masson was first contacted in October 1982 by defendant Janet Malcolm ("Malcolm"), the author of the articles and book (hereafter collectively "the book"). Malcolm had clipped the *New York Times* articles for possible future reference. (CR 95, ¶ 4.) She telephoned Masson and told him she thought she would like to write about him and the Archives dispute. (*Ibid.*) Masson responded by saying that he had read her book about psychoanalysis, *The Impossible Profession*, and had a "fantasy" that she would call (Supplemental Excerpt of Record in Ninth Circuit [hereafter "Supp. Exc."] at 3:13-21, 15:20 to 16:4). He compared her book to I.F. Stone's work as "journalism at its best." (Supp. Exc. at 3:14-21). He stated: "One doesn't want to avoid either the personal side about me and my whole life nor the side connected with my discoveries...." (Malcolm Decl., CR 95, ¶ 10; Tape 4, Side B at 50:21-24;[1] Supp. Exc. at 4:21-24.)

Masson told Malcolm that as a result of his dismissal by the Freud Archives, his reputation had been damaged, and "I became a *persona non grata*" in the psychoanalytic community. He told her, "[I] can't get a job. Not even in the university.... It's

[1] References to the transcripts of the Masson-Malcolm interviews, which are exhibits to Masson's declaration, CR 65, will be to "Tape" with the number of the tape which appears at the bottom of the page, and the page and line number.

really, I can't get a job."[2] (Supp. Exc. at 5:14 to 6:4; see also Tape 5 at 26:28 ["I could never get another grant now"]; Supp. Exc. at 7:5-9 ["I can't get a job. I can't teach in the university and I can't see patients"]. Publicity would help him sell his future books, which he saw as his only source of income. (Supp. Exc. at 6:4-18.)

Masson said he "should have no control" over what Malcolm wrote about him (Supp. Exc. at 8:4) and stated that "everything I've ever done...should be open." (Supp. Exc. at 10:11-17.) Masson openly discussed his sexual exploits, informing Malcolm (twice) that he had slept with about 1,000 women. (Supp. Exc. at 13:4-25, Supp. Exc. at 14:7-21.)

The first Masson-Malcolm interviews took place in late October and early November, 1982, when Malcolm spent a week in Berkeley, California, and met daily with Masson. (CR 95 at ¶ 6.) Most, but not all, of the interviews were tape-recorded (CR 95 ¶ 7) and Masson has prepared a 1,056-page transcript of those tape-recorded interviews. (See footnote 1 *supra*.) Nearly all the quotations in the book are taken from the tapes, but Masson and Malcolm also had a great many conversations—while walking, driving, and during meals in Berkeley; over the telephone; and during a visit Masson made to Malcolm's home, in New York, in May of 1983—that were not taped but were used in the book. (Masson Depo., Exhibit B to Kenady Decl., CR 96, at 23:5 to

[2] After he was fired by the Freud Archives, Masson filed a $13 million lawsuit against the Archives, alleging, *inter alia*, damage to his reputation. Tape 1 at 28:1-21, Supp. Exc. at 5. His Complaint contained a count for libel and alleged that Masson had been denied a chance at academic-research grants and a teaching position. Masson claimed that his firing by the Freud Archives had made him a "pariah," and that he had lost professional reputation, prestige, and employment opportunities. (Masson Deposition, Ex. B to Kenady Decl., CR 96, at 326:15 to 335:5.)

24:18, 47:4-8, 65:4-8, Supp. Exc. at 20-23.) During some of those conversations Malcolm took notes; during others she did not. (CR 95, ¶ 7.)[3]

Malcolm worked on the book for about eight months, writing it in the spring and summer of 1983. (Malcolm Decl., CR 95, ¶ 8.) The text appeared in December 5 and 12, 1983, issues of *The New Yorker*, as "Annals of Scholarship: Trouble In the Archives" Parts I and II, and was subsequently published in book form by Alfred A. Knopf, Inc. as *In the Freud Archives*.

B. Nature of the Proceedings Below

Petitioner filed his original Complaint on November 29, 1984. (CR 1.) When it turned out that many of the alleged misquotations set out in that Complaint—statements that Masson claimed were defamatory of him and insisted that he had never made—were on tape *verbatim*, his initial Complaint was withdrawn, and those alleged misquotations were never mentioned again. (*See, e.g.*, CR 1, ¶ 15(b), 15(e), and 15(i), alleging that quotations such as "analysis stands or falls with me now" were fabricated. *Compare, e.g.*, Tape 8 at 51:11-12, Supp. Exc. 24 ["analysis stands or falls with me now"] *with* CR 1, ¶ 15(i) (same); Tape 1 at 39:13-20 [analysts felt "this man could single-handedly bring down the whole business"] *with* CR 1 ¶ 15(e).)

[3] Although Masson claims in his Declaration (with no support from the tape transcripts) that Malcolm assured him that "all interviews were on tape" (Petition at 3), he has tacitly conceded that a one-hour interview during his May, 1983, visit to New York was untaped. (Appellant's Brief at 6 in Ninth Circuit; see Masson Decl., CR 100 at 4:2-9.) That New York interview was the source of the notes that contain the alleged misquotations. Masson also admits that he knew that the tape recorder was not in use on many other occasions. (See Masson Deposition citations *supra*.)

Petitioner's *First* Amended Complaint fared no better: it was dismissed because it lacked specificity. (CR 9, First Amended Complaint, and 18, Minutes reflecting dismissal of complaint.) It was replaced by a *Second* Amended Complaint (CR 20), which the court ordered Masson to revise to allege special damages. (CR 30.) In response to Masson's *Third* Amended Complaint, which referred to quotations that were not on tape, defendants filed a Motion for Summary Judgment (CR 61), raising *only* the issue of substantial truth. While that Motion was pending, Masson filed a *Fourth* Amended Complaint.

On August 19, 1986, the District Court dismissed four of the seven allegations of defamation in Masson's Third Amended Complaint in an order granting Partial Summary Judgment on the basis of truth. (See Appendix C to Petition for Writ of Certiorari, hereinafter "Petition".) The court's 1986 Partial Summary Judgment expressly encouraged defendants to make another summary judgment motion raising all available defenses. (CR 76 at 2, fn. 3; Appendix C to Petition at C-2 fn. 3.)

After Masson had had a full opportunity to conduct discovery and had taken the depositions of Malcolm and all others involved in the editorial process, defendants filed their second Motion for Summary Judgment. (CR 92-96.) On August 17, 1987, after a review of the voluminous tape transcripts and briefs, the District Court granted the defendants' Motion on the ground that:

> "each of the alleged defamatory statements is either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations. No clear and convincing evidence exists that would justify a finding

> that the writer or the publishers entertained serious doubts about the truth of the disputed passages."

(CR 114 at 26, Ex. B to Petition at B-28.)[4]

The Ninth Circuit Court of Appeals affirmed the District Court's judgment. Like the District Court, it did not consider Malcolm's notes and it assumed for purposes of the appeal that the quotations were deliberately altered. (895 F.2d at 1537.) And, like the court below it, the Ninth Circuit determined that Masson could not establish actual malice. (*Id.* at 1546.) It held that there could be no inference of actual malice "provided that the fabricated quotations are either 'rational interpretations' of ambiguous remarks made by the public figure...or do not 'alter the substantive content' of unambiguous remarks actually made by the public figure..." (*Id.* at 1539, citations omitted.)

The Court of Appeals derived this legal standard from this Court's opinion in *Time, Inc.* v. *Pape*, 401 U.S. 279 (1970), and from Court of Appeals opinions on this subject, and applied it to the facts at hand. For example, as to the quotation that analysts would one day say of Masson, "after Freud, he's the greatest analyst who ever lived," the court compared it to numerous other "'egotistical and boastful statements'" that were on tape (*e.g.*, "analysis stands or falls with me now" and "[I] could single-handedly bring down the business [of Freudian psychology]") and held that the quotation "actually reflects the substance of Masson's

[4] The District Court explicitly disregarded Malcolm's handwritten and typed notes which contained the "sex, women, fun," "I was like an intellectual gigolo," and "analysts will crawl" quotes *verbatim* in reaching its decision. (App. B to Petition at B-6 fn. 4, B-10 fn. 5, and B-23 to B-24; see Supp. Exc. 28-31, containing the notes.)

self-appraisal." (895 F.2d at 1542.) Similarly, as to the quotation that the Freud House would become a place of both scholarship and "sex, women, fun," there are undisputed tape-recorded statements that Masson and a friend would "pass women on to each other" and have "great parties" at the Freud House, that people would be "calling the police on me [Masson] every, every time I give a party or something," and that he had slept with 1,000 women. (895 F.2d at 1542; see also Supp. Exc. at 13-14, 108.) Based on these taped statements, Masson could not establish actual malice. (895 F.2d at 1542.)

Masson sought rehearing and rehearing en banc. The Petition for Rehearing by the panel was denied 2-1 along the same lines as the appeal itself, and the Petition for Rehearing En Banc was denied unanimously. *No active judge* of the *full* Ninth Circuit Court of Appeals requested a vote on the suggestion for rehearing *en banc*. (App. D to Petition for Certiorari at D-3-4.)

REASONS FOR NOT GRANTING THE WRIT

I. THE NINTH CIRCUIT AND THE DISTRICT COURT CORRECTLY HELD THAT ACTUAL MALICE CANNOT BE INFERRED WHEN THE SUBSTANTIVE CONTENT OF QUOTATIONS IS NOT ALTERED. NO CIRCUIT CONFLICT WAS CREATED.

Petitioner's first argument proceeds from an incorrect premise—that the Ninth Circuit has extended "constitutional protection to calculated falsehood." (Petition at 8.) The two courts below certainly have *not* extended constitutional protection to calculated falsehoods. They have simply applied well-established principles of defamation law to this factual situation.

A. Verbatim Quotations Are Not Required.

First, an admitted public figure such as Masson bears the burden of proving falsity as well as "actual malice." (*Milkovich* v. *Lorain Journal Co.*, U.S. , , 58 U.S.L.W. 4846, 4849-50 (1990); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986), citing *New York Times* v. *Sullivan*, 376 U.S. 254, 279-280 (1964).) It is also settled that the deliberate "adoption of one of a number of possible rational interpretations of a document that bristle[s] with ambiguities" is not enough to create a jury issue of actual malice under *New York Times*. (*Time, Inc.* v. *Pape, supra*, 401 U.S. at 290; *Bose Corp.* v. *Consumer's Union*, 466 U.S. 485, 512-13 (1984).)

Second, the failure to quote someone or something verbatim is not, and should not be, prima-facie evidence of falsity. *See generally* Eldredge, *The Law of Defamation* (1978) § 71 at 336-38; *Prosser and Keeton on Torts* (5th ed. 1984) § 116 at 842. The California Supreme Court in *Reader's Digest Assn.* v. *Superior Court*, 37 Cal.3d 244, 261-62 (1984), *cert. denied*, 478 U.S. 1009 (1986) cited both this Court's pronouncements and California law in holding that "all publications must necessarily be permitted some degree of flexibility in their choice of the proper words and phrases to describe the subject at issue."[5] The Court cited *Bose* as "clearly recogniz[ing] the need for a certain degree of literary license when properly applying the *New York Times* standard to the facts of each

[5] This diversity action is governed by California law to the extent that it is not inconsistent with the constitutional protections afforded by this Court in this area. As then-Circuit Judge Kennedy observed in a defamation case arising in California, "California itself tends to conflate common law principles and constitutional doctrine" in defamation cases. (*Koch* v. *Goldway*, 817 F.2d 507, 508-09 (9th Cir. 1987); *see also* Majority opn. in this case, 895 F.2d at 1536-37 (9th Cir. 1989).

case." *Id.* at 261. Similarly, in *Handelsman* v. *San Francisco Chronicle*, 11 Cal.App.3d 381, 386-87 (1970), the plaintiff asserted that a newspaper report about a court complaint could not be fair and true because it did not use the "verbatim language of the complaint." *Id.* at 386. The *Handelsman* court rejected that assertion: "'It is well settled that a defendant is not required in an action for libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified,....'"

Unable to dispute that basic jurisprudence, petitioner argues that quotations must be treated differently. There is no legal basis for such a distinction. As this Court observed in *Pape*, and as the circuit cases dealing with quotations have held, the fact that one is dealing with what someone "said" rather than a description of what someone "did" (*Pape*, 401 U.S. at 285-86) furnishes no reason to depart from the settled rule that verbatim accuracy is not required as long as the substance is not changed. Changes that do not "alter the substantive content" are not actionable. *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977), *cert. denied sub. nom. Hotchner* v. *Doubleday & Co.*, 434 U.S. 804 (1977); *see also Meeropol* v. *Nizer*, 381 F.Supp. 29, 35 (S.D.N.Y. 1974), *affirmed*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) ["minor fictionalizations or approximations of conversations that may have taken place" are non-defamatory and do not demonstrate actual malice]; *Mahoney* v. *Adirondack Publishing Co.*, 71 N.Y.2d 31, 517 N.E.2d 1365, 1370 (1987) [alleged misquotation of high school football coach portraying him as yelling epithets at quarterback "more the product of misperception than fabrication"; no actual malice].

Hotchner is by no means the only circuit court support for the Ninth Circuit's correct holding here. In *Ryan* v. *Brooks*, 634 F.2d 726, 733 (4th Cir. 1980), the Fourth Circuit held that it

"would not find proof of malice in [defendant's] use of slightly stronger language than his source's." (*Id.* at 733, relying on *Time, Inc.* v. *Pape, supra,* 401 U.S. at 290.) Although the defendant in *Ryan* reported that the plaintiff said salary kickbacks had been "extorted" from Southern Bell executives, the plaintiff's actual words were "forced political contributions." *Id.* at 729. The Fourth Circuit held, "Nor can the fact that Brooks changed the words of his sources create a jury issue on the question of malice. The historian's job is not to copy statements exactly as written in a secondary source, but to interpret and rework them into the whole." (*Id.* at 733.)

Similarly, in *Southard* v. *Forbes, Inc.*, 588 F.2d 140 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1979), the quotations attributed to the plaintiff "were not verbatim quotes but a 'distillation' of comments he made" to the reporter. The reporter's transcript and notes "showed that Southard [the plaintiff] used similar, but less emphatic, language." (*Id.* at 142, see especially footnote 1.) The Court found there was no defamation. (*Id.* at 145 fn. 9.)

The Ninth Circuit's ruling is fully supported by California law, too. In *Fletcher* v. *San Jose Mercury News,* 216 Cal.App.3d 172, 188-190, 264 Cal. Rptr. 699 (1989), the plaintiff contended that malice was demonstrated by the fact that the reporter "fabricated information." An interviewee [Van Nus] was quoted as saying, "There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster..." Van Nus testified at trial that he *did* have "doubt in my mind." The reporter's notes read, "'There is no, absolutely'—I have 'doubt in my mind that Claude Fletcher was involved in Weathermaster...'" Despite the reporter's equivocal notes and Van Nus's flatly contradictory testimony, the California Court of Appeal held that there was no clear and convincing evidence of actual malice.

"[T]he Van Nus quote was not so improbable as to support the inference that Herhold [the reporter] had deliberately falsified Van Nus's remarks." *Id.* at 189.

The sole case upon which Masson relies to support his theory and to argue a circuit conflict is *Carson* v. *Allied News Co.,* 529 F.2d 206, 213 (7th Cir. 1976), which involved facts radically different from those of this case. In *Carson,* there was "[n]othing in the present record" which "len[t] any support whatsoever, or even relate[d] to," the published statement. The purported quotations were "wholly imagined," were not taken from any actual interviews, and were contradicted by *all* the evidence. (*Id.* at 212-13, and fn. 15.) There was nothing to interpret, rationally or otherwise, in *Carson*; there had been no interviews. Since there had been *no statements* by Mr. Carson, the quotations attributed to him were, obviously, false. The Ninth Circuit here *accepted Carson* as good law (895 F.2d at 1539), but found it inapplicable, because in *Masson* there are 1,056 pages of tape transcripts replete with statements very similar to the untaped ones. The ruling in *Masson* simply does *not* conflict with *Carson.*

The real gist of Masson's petition is his implicit suggestion that a writer can never depart from "full direct quotation of the words of the source" (*Pape, supra,* 401 U.S. at 286) without risking liability. This Court rejected such a Draconian rule in *Pape* and should reject it again here.

If Masson's case—where all but a few of the quotations in a 48,500-word book are on 40 hours of tapes, and the rest are in the reporter's notes—is enough to require resolution of his claim by a jury, then whenever a public figure has second thoughts about what he or she said, or about how it looks in print, the federal courts will be burdened with jury trials devoted to word-by-word comparisons of quotations against notes and tapes of interviews. That has never been the law and should not be made the law. (See,

e.g., Contemporary Mission, Inc. v. *New York Times, Co.*, 842 F.2d 612, 625-26 (2d Cir. 1988), *cert. denied,* U.S. , 109 S.Ct. 145 (1989) [reporter's notes justify summary judgment; no evidence suggested she knowingly or recklessly mischaracterized statements in them; even if she did misquote, insufficient evidence of actual malice]; *Tate* v. *Bradley*, 837 F.2d 206 (5th Cir. 1988) [summary judgment granted to defendant where plaintiff alleged misquotation; held, misquotations not defamatory].)[6]

Under plaintiff's proposed strictures, a writer *must* tape all interviews and can either serve as a stenographer—in this case simply reprinting the entire 1,056-page transcript of the Masson-Malcolm interviews, replete with all of the "uhs," "yeahs," and the like—or be placed "virtually at the mercy of the unguided discretion of a jury." (*Pape, supra,* 401 U.S. at 291.) Newspapers and magazines could only run full, verbatim "question and answer" interviews, and might end up looking like deposition transcripts. That is not where this Court has struck the constitutional balance (*Pape, id.*) and not where it should be set. The First Amendment requires "breathing space" (*New York Times* v. *Sullivan* (1964) 376

[6] Petitioner and the dissenting member of the Ninth Circuit panel suggest that Janet Malcolm has committed some sort of breach of journalistic ethics. Respondents respectfully suggest that this allegation is both unfounded and irrelevant. First, there is no ethical requirement that all interviews be taped, and the dissent concedes, "[I]f a reporter takes notes and is unable to catch every word, she will be protected from liability even though she was negligent in failing to use a tape-recorder or in double-checking her source." Dissenting opinion, 895 F.2d at 1558, citing *Harte-Hanks Communications, Inc.* v. *Connaughton,* U.S. , 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989). Malcolm had either tapes or notes for every alleged misquotation. Second, "Today, there is no question that public figure libel cases are controlled by the *New York Times* [actual malice] standard and not by the professional standards rule, which never commanded a majority of this Court." *Harte-Hanks, supra,* U.S. , 105 L.Ed.2d 562, 576.

U.S. 254, 272), and that is no less true with regard to reports of what someone *says* than with regard to accounts of what someone *does*. *Pape, supra,* 401 U.S. at 285-86.

B. Actual Malice Cannot Be Shown When Quotations Do Not Alter the Substantive Content of Undisputed Remarks.

It follows from Masson's failure to show that the quotations altered the substantive content of his undisputed remarks that, *a fortiori,* he cannot show actual malice.

As this Court observed in *Bose Corp.* v. *Consumers Union of U.S. Inc.*, 466 U.S. 485, 511 (1984), "there is a significant difference between proof of actual malice and mere proof of falsity." Such proof, here as in *Bose,* is completely lacking. If the quotations reported did not alter the substantive content of remarks that Masson admittedly made, there can be no argument that Malcolm had knowledge of falsity when she published the articles and book. *Bose Corp., supra,* 466 U.S. at 490, citing *New York Times* v. *Sullivan, supra,* 376 U.S. 254, 279-280; *see also Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir. 1986), *cert denied,* 479 U.S. 883 (1986) ["this Court will not make editorial judgments about specific word choice in order to portray a plaintiff in the best possible light"]. Unless actual malice can be shown from insubstantial departure from verbatim quotations—and no court has ever held that it can be—petitioner has failed to state a claim (on his fifth attempt).

Petitioner suggests that "Malcolm *knew* Masson had not made the defamatory statements she attributed to him because she knew exactly what he had actually said, and had tape recordings of the conversations." (Petition at 13.) This contention fails both factually and legally.

First, there is no evidence of actual malice; quite the contrary. Malcolm's declaration states, "I quoted Mr. Masson accurately, I presented him as he presented himself to me, and...I invented nothing." CR 95 at ¶ 10. The tapes and her notes back this up. Her notes document virtually verbatim the challenged quotations. (See Exhibit B to CR 95, four pages of typewritten notes containing the quotations, Supp. Exc. 28-31.) In sharp contrast to *Carson*, where the writer claimed his quotes were "simply a logical extension of what must have gone on" from facts the writer read in someone else's article (529 F.2d at 212), Malcolm here has notes of a conversation which Masson *admits* took place (Supp. Exc. 28-35), and 40 hours of tapes as well. Masson's analogy to *Carson* fails.

Second, under *New York Times* v. *Sullivan, supra*, 376 U.S. 254, the public figure plaintiff must show knowledge of *falsity* and not just knowledge of a few changed words. Even if one assumes (as the two lower courts did, focusing on the tapes and disregarding the writer's notes in their analysis) that Malcolm deliberately altered Masson's words, proof of knowing *falsity* is required. As this Court recently held in a slightly different context, public figures "must show that such [false] statements were made with *knowledge of their false implications* or with reckless disregard of their truth." (*Milkovich* v. *Lorain Journal, supra,* U.S. , , 58 U.S.L.W. at 4851 (1990), emphasis added.) There is no evidence that defendants were aware of any false implications created by the quotations at issue here. Indeed, there was nothing false about them. Petitioner has failed to make the required showing in two courts. He cannot.

The Seventh Circuit (author of the *Carson* opinion) recently rejected a simplistic view of the actual malice doctrine similar to the one advanced by Masson here. In *Saenz* v. *Playboy Enterprises, Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988), the Court

(per Chief Judge Bauer) held:

> "Not only must the plaintiff establish that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply or were reckless toward the implications. Evidence of defamatory meaning and recklessness regarding potential falsity does not alone establish the defendant's intent."

Applied here, Janet Malcolm did not act with actual malice because in those few instances where quotations are not verbatim, the slight changes *in no way alter the substantive content* of what Masson said. Actual malice could be found only if Malcolm knowingly changed the substance of what Masson said, with intent to create defamatory implications. She did not.

Petitioner commends the "straightforward" approach taken in *Bindrim* v. *Mitchell*, 92 Cal.App.3d 61 (1979), *cert. denied*, 444 U.S. 984 (1979), but again a comparison of the taped encounter session there and the writer's presentation of it reveals no similarity at all. (*Id.* at 70-71.) *Bindrim* is a case in which there was a complete alteration of the substance of what the plaintiff said; *Masson* is not. In any event, the far more recent case of *Fletcher* v. *San Jose Mercury News, supra*, 216 Cal.App.3d at 188-90, found no actual malice in a case of alleged misquotation involving stronger facts for the plaintiff than *Masson*. *Fletcher* is more reflective of California law than *Bindrim*.

Masson contends that the Ninth Circuit's opinion conflicts with *Dunn* v. *Gannett New York Newspapers*, 833 F.2d

446 (3d Cir. 1987). But, in fact, the Ninth Circuit properly *followed Dunn* in holding that "rational interpretations" of ambiguous remarks are protected.

In *Dunn*, the Mayor of Elizabeth, New Jersey, blamed some of the city's litter problems on immigrants. (*Id.* at 448.) A Spanish-language newspaper summarized his remarks with a headline that when translated into English read: "Elizabeth Mayor on the Attack: Calls Hispanics 'Pigs.'" Relying on *Time, Inc.* v. *Pape, supra*, 401 U.S. 279, and this Court's later decision in *Bose* v. *Consumer's Union*, 466 U.S. 485, 512 (1984), the Third Circuit held that the headline was "a rational interpretation of remarks which bristled with ambiguities." (*Id.* at 452.)[7] The Ninth Circuit properly relied on *Dunn* in this case. (895 F.2d at 1538-39, 1541-44.)

II. THE ALLEGED MISQUOTATIONS EITHER DO NOT ALTER THE SUBSTANTIVE CONTENT OF UNDISPUTED STATEMENTS OR ARE RATIONAL INTERPRETATIONS OF AMBIGUOUS REMARKS.

Analysis of the challenged quotations—undertaken by both the District Court and the Ninth Circuit but conspicuously avoided in Masson's Petition for Certiorari—reveals that none of the alleged misquotations altered the substance of what Masson said on tape.

[7] Petitioner argued below that *Dunn* could somehow be distinguished on the ground that it involved a translation from Spanish to English. The Ninth Circuit properly made short work of that contention: "The problems created by summarization obviously are not unique to translation." (895 F.2d at 1539 fn. 2.)

A. The Quotation "I Was Like an Intellectual Gigolo" Accurately Reflects Masson's Account of His Relationship with Dr. Kurt Eissler and Anna Freud.

Masson is quoted in the book as saying that a former lover found him to be a "social embarrassment anywhere else, though you do fine in your own room." Masson then says, "And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough 'in my own room.' They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public." (895 F.2d at 1540; see CR 101, Exhibit 19, Supp. Exc. 56.) He then continues with an account of a conversation with Anna Freud.

Janet Malcolm's notes—which were not considered by either the District Court or the Ninth Circuit for purposes of summary judgment—contain the disputed quotation "I was like an intellectual gigolo. You get your pleasure from him," followed by the phrase, "I was like a very expensive cat—an elegant cat—that was dangerous to let out of the house."[8] (Respondents' Appendix

[8] Masson on tape twice compared his relationship to Eissler and Anna Freud to a dog's, rather than a cat's. He quoted Anna Freud as saying: "You don't know what it's like having Masson in my house. It's like my dog." (Tape 1 at 37:5-6, Respondents' Appendix [hereafter "Resp. App."] hereto at 7.) Moments later, Masson said that Eissler said he would always get complaints from other analysts, "Leash your maniac Masson. Please. You know, you don't know what you've unleashed on the analytic world." Tape 1 at 38:26 to 39:8, Resp. App. at 7. Respondents' Appendix to this Brief in Opposition sets out the content of the book passages, Malcolm's notes, and selected tape transcript passages relevant to those allegations of misquotation mentioned in Masson's Petition. A similar Appendix was prepared at the District Court's suggestion and appears at CR 109.

[hereafter "Resp. App."] at 3.) Malcolm testified at deposition that "when he actually used that term" in New York "it connected very well with all of the other things he had said about the relationship [with Eissler and Anna Freud] and that it was a good summary of what he had told me before about what their relationship had been like." (Supp. Exc. 65:15-19; see also Supp. Exc. 57:20 to 59:24, 60:19 to 61:25, 62-63.)

Even if Malcolm's notes are disregarded, Malcolm could not have entertained serious doubts about the truth of the description. Numerous remarks in the tape transcripts bear out the description, and show that it did not alter the substantive content of Masson's undisputed tape-recorded statements.[9] It is also clear that, as the District Court correctly ruled, the quotation was a rational interpretation of sometimes ambiguous remarks. (App. B to Petition at B-11.] "The descriptive term 'intellectual gigolo,' as used in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler." (App. B at B-11; see 895 F.2d at 1540-41.

The tape transcripts—which, of course, are not disputed—contain Masson quoting a former lover, "You're just a social embarrassment anywhere else, but you do fine in your own room." (Resp. App. at 4.) Immediately following that statement Malcolm remarked to Masson, "You said something which I was just reminded of when you were talking, when you quoted that girl who said she liked sleeping with you but she didn't want to have anything else to do with you, when you said something about how the analysts thought you were, uh, that you were this private asset

[9] Space does not permit a full recitation in this Brief of the relevant taped statements, but numerous examples are set forth in Respondents' Appendix, which compares the book passages, notes and tapes on those quotations mentioned in the Petition.

but a public liability." Masson agreed: "Yes, yeah, that's true, yeah." (*Id.* at 5.) He thus agreed that analysts, including Dr. Eissler and Anna Freud, regarded him much the way his former lover did: as someone who could please them in private, but embarrass them in public. This is exactly the sense conveyed by the disputed passage.

On another occasion, during a tape-recorded interview with Malcolm, Masson quoted his benefactor Dr. Eissler as saying:

> "'Well, you charm everybody. Yes, you charm everybody, it's true.... You charmed me. You charmed everybody. You charmed Anna Freud.'"

Masson then agrees:

> "I had the charm of the impostor sort of,...I had managed to worm my way into the graces of Eissler and Anna Freud and Muriel Gardiner through charm and this had worked on them, and they had like fallen into a spell. I had mesmerized them, and then taken away all these valuable letters and rushed off and published them, to damage and destroy psychoanalysis..."

(Resp. App. at 8-9.) In yet another taped interview, Masson mentioned the "natural" rumor that he had "literally" seduced Anna Freud, and the comments of analysts that he was "the darling of Anna Freud and Eissler," which he said was "true". (Resp. App. at 6-7.)

Masson said that other analysts felt he was a "private

asset but a public liability." (Resp. App. at 9.) Masson described the relationship between junior and senior analysts this way: "Suck stories. They're great suckers, and it's a question of who can suck the most.... Oh God, did I go through it." (Resp. App. at 10.) Masson said he and Eissler "would talk about anything, but we would never go outside and talk about it." (Resp. App. at 13.) Masson boasted of his ability to "seduce" other analysts and, for that matter, virtually everyone else. (Resp. App. at 14-16.) He described his elderly benefactor Dr. Eissler as "very easily taken in." (Resp. App. at 18.)

Given the close resemblance between the challenged passage and the tape-recorded interviews, no reasonable jury could conclude that Malcolm entertained serious doubts about the truth of what she wrote.

B. The Quotation "Sex, Women, Fun" Accurately Reflects the Substance of Masson's Remark That He and a Colleague Would "Pass Women On to Each Other" at the Freud House.

Masson's assertion that he was libelled by the reference to his plans for the Freud House (he would turn it into a place of "sex, women, fun," as well as a place of scholarship), is without merit. Again, the verbatim quotation appears in Janet Malcolm's notes. (Resp. App. at 21.) Even if the notes are disregarded, the tapes are full of Masson's tales about his sexual exploits and his unusual plans for the Freud House (Maresfield Gardens).

Masson said that he and a colleague, Masud Khan, "were to stay with each other and we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were—going to really, we were going to live it up." (Resp. App.

at 22.) He predicted, "They're going to be calling the police on me every, every time I give a party or something," "I could have had some fun," and "It would take...an act of Congress [to] get me out of Anna Freud's house. And I could have a lot of fun while they tried." (App. C to Petition at C-7.)

Masson told Malcolm, "I was a very promiscuous person. Sexually. Until quite recently, I mean, all over the world." (Resp. App. at 23.) Finally, he said (twice) on tape that he had slept with about 1,000 women. (Resp. App. at 23-26.) No reasonable fact-finder could find falsity—much less actual malice—in the face of this evidence.

C. The Quotation "Analysts will crawl...they will say that Masson is a great scholar...after Freud, he's the greatest analyst who ever lived" Accurately Reflects the Tapes.

Masson claims he was misquoted in a passage in which he described the reaction he expected from analysts to his book *The Assault on Truth*, which had recently been accepted by a major publisher. (*In the Freud Archives*, page 162; Resp. App. at 28.)

The only disputed portion of the passage—"analysts will crawl...They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived"—appears in Janet Malcolm's notes, which were taken during Masson's visit to New York to promote *The Assault on Truth*. (Resp. App. at 29.) Neither the District Court nor the Ninth Circuit, however, found it necessary to consider those notes in order to reject Masson's allegations. The District Court observed that "many similar egotistical statements appear in tape--recorded portions of the interviews." App. B at B-24-25. As the Ninth Circuit commented, in affirming the District Court's finding

on this quotation, "The purportedly fictionalized quotation actually reflects the substance of Masson's self-appraisal." 895 F.2d at 1542.[10]

For example, Masson said *on tape*, "For better or for worse, analysis stands or falls with me now." He claimed in his first Complaint (CR 1, ¶ 15(i)) that this was a misquotation, only to be confronted with a tape that proved he had in fact said those very words. (Resp. App. at 30.)

On numerous occasions during the tape-recorded interviews, Masson levelled harsh and shrill criticisms of the psychoanalytical establishment which were very similar to those in the challenged passage, predicting that his book would have a cataclysmic effect. He trumpeted the importance of his proclaimed discoveries in words substantially the same as the disputed passage. For example, Masson warned, "Analysis is either going to face this kind of stuff that I've found, which are historical documents, and change or they're going to deny them and they're going to become destroyed." (Resp. App. at 30.) He claimed, "I hold a position that no other analyst holds, including, alas, Freud.... [I]t's me. It's me alone." (Resp. App. at 31.) He claimed that analysis "started in 1895" (with Freud) and "it died in 1982" with Masson's discoveries. (Resp. App. at 31.)

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[10] Interestingly, in another article published in the *San Francisco Chronicle* two months after *The New Yorker* articles, Masson says essentially the same things that Malcolm quotes him as saying to her: "In his more expansive moments, Masson says the discoveries he made in this scholarly trove one day will give him a higher place and greater honor in the history of psychoanalysis than such giants as Carl Jung and Alfred Adler. In his meaner moments, Masson speaks of the psychoanalytic establishment abasing itself before him, pleading for him to return to the fold." "An Ex-Disciple on the Attack," *San Francisco Chronicle*, February 13, 1984, at 16. Masson apparently never challenged this description of his statements, which is entirely consistent with the disputed quotations.

As to *his* book, which was the subject of the disputed quotation, Masson had predicted, on tape, even *before* his own book was accepted by a major publisher,

> "Yeah, so I don't have a publisher, and my feeling is if I don't get one, fuck them. I'll let the book come out in Europe and they'll be sorry, you know, it'll create all this storm and a lot of attention, and then they'll come to me and say, 'Well, we'll pay you this, that and the other,' and then I can pick and choose."

(Resp. App. at 33.) He also predicted that his book "spells the beginning of the end of psychoanalysis...I think that this book really is, uh, it's the end for them." (Resp. App. at 35.)

Masson said that other analysts felt, "This man could single-handedly bring down the whole business" of psychoanalysis. (Resp. App. at 35.)[11] He revelled in talking about how much publicity would precede his book—predicting the major reaction that analysts would have to his book, and discovering "the wedge that's going to topple psychoanalysis." (Resp. App. at 46-49.)

Given all of this, the Ninth Circuit and the District Court correctly concluded that no reasonable jury could find clear and convincing evidence that Malcolm entertained serious doubt about the truth of the passage in question.

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[11] Masson contended in his initial Complaint [CR 1, ¶ 15(e)] that this passage was a "fabrication," but it, too, was in the interview tapes verbatim.

III. THE NINTH CIRCUIT FOLLOWED ANDERSON v. LIBERTY LOBBY AND, IF ANYTHING, GAVE MORE DEFERENCE TO PETITIONER'S ALLEGATIONS THAN IS REQUIRED BY THIS COURT'S RULINGS REGARDING SUMMARY JUDGMENT.

A. The Courts Properly Followed Anderson.

Petitioner argues, in passing, that the Ninth Circuit "resolved a factual dispute against Masson" contrary to *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986). (Petition at 17.) But the record shows that both the Ninth Circuit and the District Court relied solely on the undisputed transcripts of the tape-recorded interviews in reaching their decisions. 895 F.2d at 1541 [assuming Masson had not used the words "intellectual gigolo"]; App. B to Petition at B-6 fn. 4. Both courts disregarded Janet Malcolm's notes, which contained the disputed quotations verbatim (*ibid.*).

Under *Anderson*, a public figure libel plaintiff must furnish "clear and convincing evidence" of "actual malice" to avoid summary judgment. *Anderson*, 477 U.S. at 254. Moreover,

> "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... It follows...that if the factual context renders [plaintiff's] claim implausible—if the claim is one that simply makes no...sense—[a plaintiff] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."

Matsushita Elec. Ind. Co. v. *Zenith Radio*, 475 U.S. 574, 586-87 (1986).

Masson has produced no evidence to suggest that the Ninth Circuit did not follow *Anderson* and *Matsushita*. His claim that the Ninth Circuit disbelieved his denial of the "I was like an intellectual gigolo" quotation is unfounded: both the Ninth Circuit and the District Court *assumed* that Masson did not use the words "intellectual gigolo" to describe how Dr. Eissler and Anna Freud felt about him. 895 F.2d at 1541; District Court Opn., App. B to Petition at B-10, fn. 5. The two courts below also ignored Malcolm's notes in considering other disputed quotations. (App. B to Petition at B-6 fn. 4.)

B. The Courts Could Have Considered Malcolm's Notes, But Did Not.

Instead of resolving any disputes against Masson, the two courts have, if anything, been exceptionally deferential to him in disregarding Malcolm's notes, despite the utter implausibility of Masson's contention that the notes were fabricated. The notes could have been considered because the challenge to them is implausible and "makes no...sense." *Matsushita*, 475 U.S. at 587.

Malcolm has stated that the notes were taken from statements that Masson made during a visit to her home in New York in May, 1983. CR 95 ¶¶ 14, 19. Masson confirms that he made the visit. He was present in New York to address and exhort his publisher's salespeople about his new book. Masson Decl., CR 100, ¶ 5 at 3. He concedes there was an hour-long discussion with Malcolm during this visit. *Id.*, ¶ 5, at 4.

Moreover, Masson admits that he stayed up all night reading Dr. Eissler's book about Tausk before the conversation at issue (Masson Depo., Exhibit B to Kenady Decl., CR 96, at 65:24

to 66:28, Supp. Exc. at 33-34), and Malcolm's notes contain a reference to Dr. Eissler's book about Victor Tausk. (Exhibit B to CR 95 at 1, Supp. Exc. 28.) In addition, in a letter Masson wrote to Malcolm very shortly after his visit, on May 17, 1983, he referred to "the Schur material," which was also referred to Malcolm's notes. (Compare Ex. 1 to CR 100, Supp. Exc. at 32, with Notes, Ex. B to CR 95, at 2, Supp. Exc. at 29.) The letter also referred to his desire for "vengeance" and "vindication," the gist of the disputed quotations. See Supp. Exc. 28, 32.

Masson does *not* dispute other passages in Malcolm's book that are taken from these same notes. Indeed, the passage at page 14 of the book (Supp. Exc. at 37) contains *unchallenged* quotations (referring to the profound consequences his book would have) that are taken from the *same page* of the notes. (Supp. Exc. 28.) His allegation that the notes are fabricated is "implausible." He was obligated to present significantly probative evidence, "more persuasive evidence to support [his] claim than would otherwise be necessary." *Matsushita, supra*, 475 U.S. at 587, 89 L.Ed.2d at 552. He has not, and he cannot. The Ninth Circuit—instead of resolving factual conflicts against Masson—assumed the truth of an implausible claim that the notes were fabricated.

Finally, Masson argues, in passing, that the *Anderson* standard should not apply in this case. (Petition for Certiorari at 19.) Masson's contention is frivolous. He conceded below that the *Anderson* and *New York Times* "clear and convincing" evidentiary standard applies to the actual malice determination at the summary judgment stage. (Brief for Appellant in Ninth Circuit at 9, citing *Anderson*.) Petitioner's last-minute argument that *Anderson* does not apply to this case seems a concession that he cannot meet the

standard.[12]

IV. THE NINTH CIRCUIT'S DISCUSSION OF THE INCREMENTAL HARM DOCTRINE IN DICTUM AS A FIFTH GROUND FOR AFFIRMANCE DOES NOT WARRANT THIS COURT'S REVIEW ON THE MERITS.

Petitioner finally seizes upon dictum in the Ninth Circuit's decision, which served as a fifth ground for affirmance, to contend that there is a circuit conflict which needs resolution. (Petition for Certiorari at 20.) Given that this part of the Ninth Circuit's opinion was dictum and there were four other grounds that supported the Ninth Circuit's resolution of the issue, the contention is without merit.

The Ninth Circuit disposed of Masson's allegations on the "I was like an intellectual gigolo" quotation on five grounds: (1) the District Court correctly found that the passage was a rational interpretation of ambiguous comments; (2) the quotation did not alter the substantive content of Masson's description of himself as a "private asset but a public liability" to Dr. Eissler and Anna Freud; (3) there was no actual malice; (4) the quotation is not defamatory; and (5) the quote is "non-defamatory under the 'incremental harm branch' of the 'libel-proof' doctrine." (895 F.2d

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[12] Petitioner claims a "conflict among the circuits" on the issue of whether "the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence." *Harte-Hanks, Inc.* v. *Connaughton*, 491 U.S. , 109 S.Ct. 2678, 2682 fn. 2, 105 L.Ed.2d 562, 572-73 fn. 2; Petition for Certiorari at 19. Neither party has ever briefed that issue in this case and neither court below discussed the issue. Petitioner simply seeks to bootstrap his way into a circuit conflict on an issue that does not exist in this case.

at 1541.) Petitioner asserts that adoption of the "incremental harm branch" of the "libel-proof doctrine"—a fifth ground for affirmance, and one not necessary to the court's decision—creates a conflict with *Liberty Lobby* v. *Anderson*, 746 F.2d 1563, 1568 (D.C.Cir. 1984), *reversed on other grounds*, 477 U.S. 242 (1986).

It is respectfully suggested that this alleged technical conflict fails to present the "special and important reasons" necessary for certiorari review. (Supreme Court Rule 10.1.)

First, the "libel-proof doctrine" discussion was dictum, a fifth ground for affirmance as to only one quotation. Even if this Court finds the issue an important one, the granting of review on the issue would serve no purpose. Indeed, this Court unanimously denied certiorari in *Guccione* v. *Hustler Magazine, Inc.*, 800 F.2d 298, 303-04 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987), where the same issue was *directly* presented by the Second Circuit's approval of the libel-proof doctrine.

Second, the issue can be resolved under California law. The California Supreme Court in *Reader's Digest Assn.* v. *Superior Court, supra*, 37 Cal.3d at 266, noted the insignificance of three sentences in a long article that contained much other harmful material. This suggests that the California Supreme Court would adopt the "incremental harm doctrine" in a case such as this one, where only a handful of passages in a 48,500-word book are challenged, and many quotations which would have an equal or greater impact on the reader are not challenged.[13]

[13] The Court in *Liberty Lobby* v. *Anderson, supra*, 746 F.2d at 1568-69, *reversed on other grounds*, 477 U.S. 242, regarded the then-existing decisions which had adopted the libel-proof doctrine as "all decisions of federal courts interpreting state law in the absence of state court guidance." Given the California state law origin and impact of the majority decision on this point, any alleged error (and we do not believe there was any) can be and should be corrected by the California Supreme Court, not this Court.

Finally, this case presents a clear example of the need for the incremental harm doctrine. Masson filed a $13 million lawsuit against the Freud Archives in *1981* alleging that he had become "persona non grata" and a "pariah" when he was fired by the Archives, two years before Malcolm's article. (Supp. Exc. at 5-6; Masson Depo., Ex. B to CR 96, at 326:15 to 333:19, especially 332:28.) He has been permitted to file four amended complaints and he still does *not* challenge numerous quotations that paint him in a most unappealing light. He therefore has no claim to more federal court time. "Instead, the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided." *Guccione* v. *Hustler Magazine, Inc., supra*, 800 F.2d at 303.

CONCLUSION

This lawsuit was brought by an outspoken public figure who had sought a forum for his harsh criticism of former colleagues in the field of psychoanalysis. Stripped to its essence, it is a case in which petitioner blames a serious writer and responsible publishers for accurately reporting his own ill-advised words. This is not a case, like *Carson*, where an interview was fabricated and a person was maligned. This is, in the words of then-Circuit Judge Kennedy, "the precise sort of contest society can endure without redress from the courts." *Koch* v. *Goldway*, 817 F.2d 507, 510 (9th Cir. 1987).

The Ninth Circuit scrupulously protected reputational interests in this case by holding that public figures should be quoted in a way that does not alter the substance of what they have said. Two courts have now combed through 1,056 pages of tape transcripts, examined the few passages Masson challenges in a

48,500-word book, and, even without considering the reporter's notes, have found no evidence of actual malice. Their decisions should stand.

Dated: July 18, 1990.

RESPECTFULLY SUBMITTED,

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
Counsel of Record
Attorneys for Respondents

OF COUNSEL: JOSEPH COOPER
For *The New Yorker*

RESPONDENTS' APPENDIX

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RESPONDENTS' APPENDIX

This evidentiary appendix compares passages from Janet Malcolm's book *In the Freud Archives* to Janet Malcolm's notes (Exhibit B to Janet Malcolm Declaration, District Court Clerk's Record No. 95; Supplemental Excerpt of Record in Ninth Circuit Court of Appeals at 28-31) and the transcripts of the Masson-Malcolm interview tapes. Those transcripts, which were prepared by petitioner, appear as Exhibits to the Declaration of Jeffrey Masson, Clerk's Record ("CR") Document No. 65.

Respondents prepared a similar appendix at the suggestion of the District Court. That appendix appears at Clerk's Record No. 109 in the District Court Record.

THE BOOK

"Wendy was even worse, in her way, though I thought, Well, at least she's a woman. I remember once trying to touch her, and she looked at me and said, 'Frankly, I don't think you're man enough to have an affair with me.' I ran into this sort of thing everywhere I went at Harvard. Then I met a rather attractive older graduate student, and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, 'Well, it's very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room.' And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough 'in my own room.' They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public. Do you know what Anna Freud once said to me? She said, 'If my father were alive today, he would not become an analyst.' I swear, those were her words. No, wait. This is important. I said that to *her*. I said, 'Miss Freud, I have the feeling that if your father were alive today he would not become an analyst,' and she said, 'You are right.'"

(*In the Freud Archives*, pages 37-38.)

MALCOLM'S NOTES

It was a folie a trois—me and Af and E. I was a fantasy of AF's. She liked to hear that analysts are such creeps, dolts, etc. I was giving her a good time. I was like an intellectual gigolo. You get your pleasure from him. I was like a very expensive cat—an elegant cat—that was dangerous to let out of the house.

(Exhibit B to Malcolm Declaration, CR 95, Supplemental Excerpt of Record in Ninth Circuit at 30)

THE TAPES

MASSON: Right, just before, yeah. And, and that's one of the reasons I moved, I was just, you know, I was just really shocked by this and I didn't know what to make of it and, I mean I knew, and then I met Wendy and she was even worse, and I thought: Well, at least she's a woman, you know. [laughs] I remember once trying to touch her and she looked at me and she said, "I don't think you're man enough to have an affair with me, young man." And err, you know, sort of trembled and I don't know, I just met this everywhere I went, and then I met this Thornton Wilder's niece, who's a rather attractive older woman, graduate—

MALCOLM: I, oh, no, no, no. I met his sister.

MASSON: Ah ha. And she was rather sexy and I had an affair with her and she once took me to some event, art event, and she was very sorry, and she said, "Well, you know, it's nice sleeping with you in your room but you're the kind of person who should never leave the room." [laughs]

MALCOLM: [laughs]

MASSON: "You're just a social embarrassment anywhere else, but you do fine in your own room." And that, I mean, there was a lot of that at Harvard, you know, there really was.

(Tape 7 at 5:5-25.)

MASSON: And I don't think for one minute he's forgotten. I

mean, he knows it. He, he's just terribly embarrassed. He doesn't want in any way to be associated with, I guess, you know, for an analyst, it could be dangerous, possibly—

MALCOLM: Yeah, well, you know, you said something which I was just reminded of when you were talking, when you quoted that girl who said she liked sleeping with you but she didn't want to have anything else to do with you, when you said something about how the analysts thought you were, uh, that you were this private asset but a public liability.

MASSON: Yes, yeah, that's true, yeah.

MALCOLM: So, there was that kind of double standard, like between team-mates, you know, you can [???] horse around together in the privacy of your own home but—

MASSON: Janet, can you hold on one-half second. I'm blocking someone's driveway. I must have misparked.

MALCOLM: Sure.

MASSON: It'll just take me a sec.

MALCOLM: Okay.

MASSON: Okay? Or do you want to call right back?

MALCOLM: Uh, I'll hold on. That's okay.

MASSON: Okay, just one sec.

MALCOLM: Sure.

MASSON: Hi. Uh, I guess, you know it's a little bit like the business world or the social world. I mean, it wasn't, it wasn't a scientific world, you know? I don't think that people in the sciences would have this same kind of problem, do you?

MALCOLM: I don't, I don't know about the sciences. I mean, one, one, it's probably in every organization world [???] some kind of double standard [???]

MASSON: Yeah, but that, it would be so intimately connected to what you do. I mean, I think if you were a embarrassment socially, it wouldn't affect your standing as a physicist but I think here, well, it's, it's hard to get one's finger on it, but I think that with something, I mean I think that there really is this thing, I mean, I was just thinking the other day, the very fact that they would call Freud, all these people, still today, The Professor.

(Tape 7 at 14:18 to 15:28.)

MASSON: The rumor has gone around that I seduced Anna Freud. Literally.

MALCOLM: Really?

MASSON: Yeah, literally, and that's why—she's eighty-seven—I mean, if you look at her nobody has ever seduced Anna Freud,

believe me. But, I mean, it's natural, you know, and they'd all say, "Oh, Masson, he's the darling of the International." Originally in Toronto, and then, "Oh, now he's become the darling of Anna Freud and Eissler." And it's true, but it's only true in so far as, I mean, I am exactly as I am with you, and they like that, and even Anna Freud, she complained endlessly to Muriel Gardiner. She said, "You don't know what it's like having Masson in my house. It's like my dog." She has these, you know, she inherited these dogs from her father, these Chows, and they're totally unmanageable. She adores them. They race around the garden, they tear up everything, they get into everything. She said, "Masson is just like, uh, uh, Sophie," I think her name was. And I was supposed to inherit them. She asked me if I'd take the dog. She adored him. Lovely dog. But he gets into everything. He's irrepressible.

(Tape 1 at 36:23 to 37:13.)

MASSON: And I suppose the question is "why?" Who would Eissler—somebody in France said, "*Monsieur Masson, si vous etes un lapin,*"—"if you're a rabbit"—"*on n'invite pas un renard,*"—"one doesn't invite a fox." "Now you are a fox. And the analysts are rabbits. Why did they invite you down into their lair?" And it's a good question. I mean, it's not [???] He told me, "You don't know the number of phone calls I would get, Masson, every time you would go anywhere on a trip, I would get an urgent telegram, an urgent phone call: "Leash your maniac Masson. Please. You know, you don't know what you've unleashed on the analytic world. You're sending this man around. He's going through everybody's papers. He's coming up with all

kinds of things. He's talking about it. He's irrepressible. This is not good for analysis." And Eissler was adamant. He said, "Nobody will tell me what to do."

(Tape 1 at 38:25 to 39:11.)

MASSON: And they complained. Eissler said, "You went to see Bleuler, a European professor of psychiatry, wearing a t-shirt and blue jeans, ahh, does that show judgment, gentlemen?" You see, Bleuler—

MALCOLM: At this meeting he said that?

MASSON: Yeah, yeah, "And what was the result?" And I said, I was so pleased because I had a trump card, "The result, Dr. Eissler, is right here in a letter from Bleuler saying he's giving me the letters. Ya."

MALCOLM: [laughs]

MASSON: "Well, that's interesting. Well, you charm everybody. Yes, you charm everybody, it's true. I never said it's not true. You are a charmer. You can charm anybody. You charmed me. You charmed everybody. You charmed Anna Freud." But with a slight hint that this was a psychopathic quality. I had the charm of the impostor sort of, I mean everybody was thinking: Ah ha, you know, the classic paper of Abraham on the impostor. It's a real Felix Krull character, that's what I was. I had managed to worm my way into the graces of Eissler and Anna Freud and Muriel Gardiner through charm and this had worked on them, and they had

like fallen into a spell. I had mesmerized them, and then taken away all these valuable letters and rushed off and published them, to damage and destroy psychoanalysis out of some kind of Oedipal or unresolved struggle with my father, cheap.

(Tape 6 at 48:7-27.)

MASSON: I couldn't get patients, I couldn't meet people, and I didn't know what to do. And I turned to these people who were supposed to be my friends and helpers and none of them offered anything. I mean they—nothing, literally nothing. Now I was totally available, totally free, I didn't have a practice, I wasn't doing anything, I wanted to meet people. And nobody went out of their way. They felt, in a sense, I was a private asset but a public liability.

MALCOLM: Uh-hm' 'm-hmm.

MASSON: They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.

(Tape 12, at Frits Staal's house, at 15.)

MALCOLM: When they're in analysis, they're in this regressed state, right—

MASSON: That's right.

MALCOLM: —and they go around worshipping the older analysts, and—

MASSON: Yeah.

CAMMELL: Hmm.

MASSON: Yeah, and tell stories about them, all the time—

CAMMELL: And you did it, you, you did it.

MASSON: Suck stories. They're great suckers, and it's a question of who can suck the most.

CAMMELL: You did it too, because you did it for a while, right? You had to go through it?

MASSON: Oh God, did I go through it. I mean, I remember Shengold telling me: "Imagine my amazement, Jeff, one day the phone rings and I pick it up and I hear 'Kurt Eissler here.' I nearly fell off my chair, I nearly collapsed. Kurt Eissler calling me, Leonard Shengold, what do you make of that? I was trembling as I picked up the phone." I mean now that is an absurd notion.

(Tape 12, at Frits Staal's house, at 24.)

MASSON: I can remember, eh, sitting at a dinner party with various so-called important analysts. Well, they are important if you, you know, within that hierarchy here. Various of the training analysts here. And I desperately wanted to be recognized as

somebody to be taken into account; this was before anything had happened. And I kept waiting for the phone to ring and somebody important—And sure enough, the phone rang during one of these dinners, and we had a, a, a maid at the time, and she said, "There's a certain Dr. Eissler on the telephone." And everybody looked at one another, and I was so pleased—

STAAL: Yeah, of course.

MASSON: —I could have fainted on the spot.

CAMMELL: Eh-hah.

MASSON: And I said, "Tell him I'm having dinner, I'll call him later." And I would have, sort of clapped my hands with glee. Now that is a totally childish, adolescent reaction.

(Tape 12 at 25.)

MASSON: Anna Freud told me, "If my father were alive today he wouldn't become an analyst." I swear, those were her exact words. No. Well, this is important. Cause I, I said that to her. I said, "I have, Miss Freud, I have the feeling that if your father were alive today, he would not become an analyst." And she said, "You are right." And she would never, ever say that in public. And, in effect, when I said that I was fired. Is that right? If she really believes it, and if it's really true, why should one, why should one not be able to say it?

(Tape 1 at 46:7-16.)

MASSON: I was a very promiscuous person. Sexually. Until quite recently, I mean, all over the world. That was another thing that Eissler, Eissler knew about it and didn't mind my always bringing mistresses over to see him. And he loved it. "Ah," he said, "who are you bringing now?" But he didn't, you know, he got lots of calls, "What is this guy doing here; he's coming in with some woman?"

(Tape 2 at 10:3-9.)

MASSON: I, I suppose the real answer is because Eissler adored me, and Eissler was all-powerful with Anna Freud, and once Anna Freud liked me as well, there was nothing to stop me.

(Tape 5 at 33:27 to 34:1.)

MASSON: I was the bad boy he [Eissler] always wanted to be, and not only that, I was successful at it, and I had a certain charm...

(Tape 5 at 34:27-28.)

CAMMELL: Yeah, maybe people, maybe these people really, I don't know, you *are* c[illegible]rming, maybe they really—

MASSON: Fell in love? That's what somebody said about Eissler, that he was in love—that's what Furst said. Furst said to me, he said he behaved like a jilted lover.

(Tape 12 at 12.)

MASSON: Well it's true that most of these people don't in fact have close friends. It's hard. And it's very hard I think to find a close friend who shares your interest and shares your point of view, and your way of looking at the world and Eissler and I, and Vic Calef and I, certainly saw the analytic world in the same way. You know, all I would have to do is mention Mahler's name and they'd both gag, or you know, one could amuse oneself for hours mentioning all the famous writers in psychoanalysis who were poor, bad, junky, and we would talk about it and why. I mean, we never had a disagreement. And if I admired anybody they would be sure to admire them.

(Tape 12 at 13.)

MASSON: Yeah. He (Eissler) could do anything. I think in the end he just got too frightened. It's like the Sorcerer's Apprentice, you know, he had unleashed something and he couldn't stop it. What would I find next? And if he could be certain that what I found would stay with me, then that would have been fine, and I think that's where he went wrong, that's what he expected me to do. It would be family. He and I would talk about anything, but we would never go outside and talk about it.

(Tape 5 at 35:24 to 36:3.)

MASSON: Yes, definitely. I saw things that he never saw, but I wasn't willing to shut up about it. If I had, everything would have been fine.

(Tape 5 at 37:1-3.)

MALCOLM: —that maybe it would be good to play it out with, with a, with a woman analyst.

MASSON: Oh, I agree—

MALCOLM: And in the—

MASSON: But it would have been, but I don't—

MALCOLM: —way, to fall in love with your analyst as one does with the one of the opposite sex—

MASSON: Right.

MALCOLM: —and then see what happens.

MASSON: Oh but it would have been absolutely devastating for me, I mean, I would have put such effort into seducing her that—

MALCOLM: Yes, you would have, but if she was, if she was good, she would not have gone to bed with you and that might have been something that you would have found something interesting in, no?

MASSON: Yeah, but imagine the tremendous disappointment there if she had. [laughs] I mean in a way, you see, I seduced Schiffer. I didn't; it didn't happen sexually, but—

MALCOLM: Yeah.

MASSON: —it happened emotionally.

MALCOLM: Yeah, yeah.

MASSON: And that was a great disappointment to me. I mean when he calls me now, it just saddens me, you know? When I feel these attempts on his part to get close to me and to use me, and the reason it's so sad is 'cause I realize that, you know, he, he's hungry ultimately. He really wants something from me and that part of the pact of an analysis is you don't want anything from the patient.

MALCOLM: That's right. There should be that—like Zen desirelessness, right?

MASSON: That's right, I mean, it is a sort of monkish kind of thing which is another good reason why I shouldn't do it, you know? I don't like monks. Uh, I also don't believe in them. I don't believe that anybody is a successful monk.

MALCOLM: But you should probably meet somebody you can't seduce, no? In—

MASSON: That, that would be nice. [laughs]

MALCOLM: [laughs] It would probably be a very interesting experience for you.

MASSON: I'm sure it would be.

MALCOLM: But you feel very pessimistic about that, right?

MASSON: Yes.

(Tape 20 at 7:4 to 8:19.)

MASSON: And then when I said, "Well, but after all I did get them," he said, "Yeah, because you can charm anybody."

MALCOLM: Yeah, I see. Okay. So—

MASSON: But you see, I mean, on the other, on the other hand, Eissler in this letter that I read you is complaining that everybody, literally just about everybody that ever met me complained.

MALCOLM: And is that true?

MASSON: Yeah, I suspect it is true. But you must remember who these are. These are all the analysts. And he said, "The exceptions were Muriel Gardiner and Anna Freud," and that's it really.

MALCOLM: Those, those were the three, yeah.

MASSON: Yeah.

MALCOLM: You, your three, three protectors.

MASSON: And people—He excused people like Parin, who were communists, or anybody left-wing. But any normal conventional person was not happy to meet me. And he felt, uh, that I was

therefore bringing disgrace on the Archives. And I think he got a lot of this. I think that every time I went to a meeting, people would call Eissler.

MALCOLM: Yeah, yeah.

MASSON: And I think that they were often just puzzled. You know how is it—? Now he did get something of the other side. Uh, and I finally said to him, "Well, are these people you respect?" And he said, "No."

MALCOLM: Um-hmm.

MASSON: And I said, "Well then, you should be pleased." He said, "Yes, that's a point. That's a good point."

MALCOLM: Um-hmm.

MASSON: He was very pleased. He said, "Yes, yes, you're right. I should keep that in mind."

MALCOLM: [laughs]

MASSON: And it's true. He would call me up and he'd say, "You know what so-and-so said about you? He says that you're dishonest." And I said, "Well, is so-and-so reliable?" "No, of course not." I said, "So what do you care?" [laughs]

MALCOLM: He's, he's a very artless man in some ways, isn't he?

MASSON: Yeah, he is. I mean he's, like he's very easily taken in.

(Tape 20 at 48:26 to 50:10.)

MASSON: Every analyst loves, I mean, you know, the way to get one-up is to use the word "Anna." Nobody calls her Anna, but everybody pretends to. [laughs]

MALCOLM: [laughs]

MASSON: "When I was with Anna," and they were not, of course, I mean, that's that's one-upmanship, to to say, "I know Kurt Eissler. Kurt and I were talking the other day and he told me—" That kind of thing. They love it. Analysts are the worst name droppers in the world. And ultimately the whole idea is to get close to Freud and to get close to some documents, so it was a very traumatic experience for American analysts to see this young guy running around with thousands of letters sticking out of every pocket.

(Tape 5 at 36:13-25.)

THE BOOK

"Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.

"When word got around that Eissler had made me his successor, other things started to come my way. I was made a director of the Freud Copyrights. This is the group, made up of Mark Paterson, Masud Khan, Mrs. E. L. Freud, and me—I still haven't been kicked off it, for some reason—that controls the copyright of Freud's writings. My appointment happened through Masud Khan. He's a well-known English analyst. At first, he was very suspicious of me, but when he saw the future—how I was coming in and taking over from Eissler—he wanted to be on good terms. So he invited me to his house and wrapped his arms around me and said, 'My dear boy, you must become a director of the Copyrights.' He's a very handsome man, about six feet seven. His full title is Prince Masud Khan—he's an Indian raja—and he's very fashionable. He used to be married to a Russian prima ballerina. And he's generous—he gave me books and a big picture of himself at our first meeting—and very articulate. He says what he thinks. He's got class and he's fun, and we took to each other right away..."

(*In the Freud Archives*, pages 33-34.)

MALCOLM'S NOTES

Maresfield G would have been a centre of scholarship, but it also would have been a place of center of sex, women, fun. It would have been like the change, in the wizare [sic] of oz, from black and white into color.

(Exhibit B to Malcolm Declaration, CR 95, Supplemental Excerpt of Record in Ninth Circuit at 30.)

THE TAPES

MASSON: Masud Khan invited me to this house and he said, "My dear boy," putting his arms around me, "You must become Director of Copyright." I said, "Well—" He did that actually and he did it because he liked me and he liked me because I was in well with Eissler and I had, I mean, he saw, you know, the future. I was coming up and I was going to be taking over, and he wanted to be on good terms. He, you know, is very political that way. Gave me a big picture of himself and wrapped his arms around me and gave me books. He's fun and he's generous, a very handsome man, about six foot, seven inches, looks like a giant. Very articulate and says what he thinks and he's very fashionable. He's married to a prima ballerina, a Russian woman and—

MALCOLM: Makharova.

MASSON: Yes. He's married to her and he's got lots of, he's got class, you know. And he's fun. I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs]—

MALCOLM: [laughs]

MASSON: —going to really, we were going to live it up.

(Tape 9 at 17:23-18:18)

MASSON: I was a very promiscuous person. Sexually. Until quite recently, I mean, all over the world. That was another thing that Eissler, Eissler know about it and didn't mind my always bringing mistresses over to see him. And he loved it. "Ah," he said, "who are you bringing now?" But he didn't, you know, he got lots of calls, "What is this guy doing here; he's coming in with some woman?"

(Tape 2 at 10:3-9)

MALCOLM: Well, you commented that you slept with a thousand women. I was nearly reminded of that scene in *Don Giovanni*, you know, the Leporello—and Bob—

MASSON: Yeah.

MALCOLM: —I talked to him yesterday. I forget what the context was, but he also used that number—

MASSON: Yeah.

MALCOLM: —of all these women that you've slept with, and I thought, I mean, "Did you really count?"

MASSON: No, but I, I once figured it out in terms of you know, I slept with so many women per week for so many years—

MALCOLM: That, that's a very large number.

MASSON: Close to a thousand, yeah. I mean that's accurate.

It is around that. I'll say between seven hundred and thirteen hundred, something like that.

(Tape 13 at 27:2-25)

MALCOLM: How did you first become interested in analysis?

MASSON: Well, I was very neurotic myself and I, my main symptom was total promiscuity, sleeping with every woman I could meet.

MALCOLM: This was as an adolescent or—?

MASSON: As an adolescent. At Harvard. And I went to see—

MALCOLM: You were an undergraduate and graduate student at Harvard?

MASSON: Yeah. And I went to see Erik, Erik Erikson, and asked if I could go into treatment with him, and he said, "No," but he knew somebody very, that he had great respect for, and I went to see this person who was an analyst and I went into therapy. Then I left for India and then I still had the same problems, so when I got to Toronto, I went into therapy again, and then I decided to go back and really go into analysis five times a week to get to—

MALCOLM: But, by the problem of promiscuity, you would just fall in love with a lot of girls—?

MASSON: No, no, I didn't fall in love. I just screwed a lot of women, like, you know, a different woman, two or three women a week.

MALCOLM: You didn't care about them? You just wanted to, to have the sex?

MASSON: Yeah, I just wanted sex. Lots of it. With lots of different women. And it never seemed to get any better. And it seemed to me that that had something to do with my childhood and that I could find out something about it through analysis, that surely this was not just—I mean, I didn't say to myself: Well, you're just a lovable guy [laughs]. You know, you just love women and women love you, so it's easy. I knew there was something wrong with it, something was preventing me—

MALCOLM: You saw it as an illness?

MASSON: Yeah, I saw it as an illness.

MALCOLM: Just by yourself or did somebody kind of, you know—?

MASSON: Well, a lot of the women would help me. You know, women didn't like that. I'm, I'd sometimes get closer to a woman than just sleeping with them one night. Sometimes I'd be with them for a few weeks or a few months, but I was always looking around for other women. And they'd say, "Hey, you know, you're sick and I'm in love with you. Why aren't you in love with me?" That kind of thing. And after a while, I realized:

Well, you know, I can't say because I'm looking for the right person. I'd met, I don't know, I'd slept with close to a thousand women.

(Tape 5 at 2:7-3:25)

MASSON: So I went to Harvard. I really think I would have done much better anywhere else.

MALCOLM: Yeah, yeah.

MASSON: It just wasn't for me, you know. It was an awful atmosphere. In a way, I mean it was good for scholarship.

MALCOLM: Yeah.

MASSON: You know, if you really wanted to become a scholar, by God, that's what I wanted more than anything in the world. I wanted to become a scholar. That was just my, I don't know, like some teenager who wants to be a football player.

MALCOLM: Yeah.

MASSON: I just was desperate. And I did. Uh, but it cost me a great deal doing it.

MALCOLM: Yeah, so, so you had a painful experience there?

MASSON: It was a very painful experience. I was quite miserable for a while. But there were always, I mean, thank God, there were

women and I went off to Wellesley and I met lots of women and I screwed around a lot and that helped.

(Tape 7 at 8:2-20.)

MASSON: I mean, I've never met an analyst who wasn't dull. If you can name me one that I know, uh, I mean, as a person. I mean, even Shengold, he's dull. You know, you spend, you're not going to go off on vacation and have a great time with Len Shengold. You know, he's overweight and he's not in shape. You know, to find an analyst who [laughs] is just sort of normal and likes to do things, I mean, I couldn't imagine palling around with an analyst. You know, "Let's go pick up some women. Come on, let's—" They wouldn't do that, right?

(Tape 7 at 20:3-12.)

THE BOOK

A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux had taken *The Assault on Truth*. "Wait till it reaches the best-seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now."

(*In the Freud Archives*, page 162.)

MALCOLM'S NOTES

You watch when this book hits the best-seller list, the analysts will crawl back. They move whichever way the wind blows. They will want me back, they will say Masson is a great scholar, a major analyst, after Freud he's the greatest analyst who ever lived. Suddenly they will be calling, begging, cajoling, please take back what you've said about the profession, our patients are quitting. When I was fired the Los Angeles, San Diego, and Detroit institutes cancelled my appearances to read papers. Believe me, when the book reaches the best seller list, they say Masson was always our choice for being the major speaker. The dum dums will say its crazy. But there are not that many of them. They will try a short smear campaign, then they'll try to buy me, ultimately they will have to shut up. Judgement will be passed by history. There is no refutation of this book possible.

It's going to cause a revolution in psychoanalysis. There is not a patient in analysis who will not come holding the book in his hand and say, why didn't you tell me this? What the hell is going on? We want an explanation. This man is telling me that there is something profoundly wrong at the core of the profession. There is something wrong at the core.

(Exhibit B to Malcolm Declaration, CR 95, Supplemental Excerpt of Record in Ninth Circuit at 28.)

THE TAPES

MASSON: Yeah but I've become, for better or for worse, analysis stands or falls with me now.

MALCOLM: Well that's a very grandiose thing to say.

MASSON: Yeah, but it's got nothing to do with me. It's got to do with the things I discovered.

MALCOLM: Well, whatever, that's still a (???) thing and, and I'm not there yet.

MASSON: Well, you'll see.

MALCOLM: I can't think in this global yet. Maybe I will—

MASSON: You will.

MALCOLM: —after I've talked to a few more—

MASSON: Maybe you won't until you've written the article and see the reaction but it will, analysis is either going to face this kind of stuff that I've found, which are historical documents, and change or they're going to deny them and they're going to become destroyed.

(Tape 8 at 51:11-27.)

MASSON: I mean, just—You're going to hear it. Talk to enough

analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kurt Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. It's me alone.

(Tape 6 at 61:21 to 62:2.)

MALCOLM: Well, Freud started it all.

MASSON: He was the first analyst.

CHILD: [???]

STAAL: See, I know, I know very little about Freud—

MASSON: Analysis was started in 1895 and—

STAAL: —and psychoanalysis. I know more—

MASSON: —it died in 1982.

(Tape 12 at 34.)

MASSON: No, I'm just trying to think of what, you know, because it's been—It's new to me, in a sense, all of this, and it's all, really in the last week, I went to Europe and suddenly it was

like a bomb bursting. *Le Monde*, I never expected *Le Monde* to phone me. And *Spiegel*, I mean they all want to do all of this. And I'm trying to figure out what it is, whether it's—I, I have a feeling there is a real groundswell beginning about the whole of therapy, psychoanalysis, psychiatry, that there's something profoundly wrong and that people sense this and they want something they can, "Ah-hah, here is what it is."

MALCOLM: Um-hmm.

MASSON: So I feel that, you know, my story, I mean it's hard to avoid it. Even at this famous witch trial with the thirteen [laughs] judges and myself, the whole question of Ferenczi came up. And they said, you know, this, "We can't help thinking of Ferenczi; this is what happened to Ferenczi at the end, too. He was paranoid." And I said, "Yes, but look, A: I'm not paranoid, B: Unlike Ferenczi, I'm not sick. I'm not old, I'm not tired, I'm young, I'm a good fighter. If you people want a fight you're going to get one. There're thirteen of you and one of me, that's just about the right odds. Considering how frightened all of you are." And I pointed out to them that they had been terrified. Every time Eissler said even the most absurd thing, they would all agree with it.

(Tape 1 at 2:4-28.)

MASSON: And I've got to soon sit down and, you know, work ten hours a day on my book because it's everything, everything hangs on that book. I have a French contract, an Italian and a German. Hopefully, Harvard is going to take the book now and give me some money. If they don't, Farrar, Straus.

(Tape 5 at 57:2-6.)

MASSON: Yeah, so I don't have a publisher, and my feeling is if I don't get one, fuck them. I'll let the book come out in Europe and they'll be sorry, you know, it'll create all this storm and a lot of attention, and then they'll come to me and say, "Well, we'll pay you this, that and the other," and then I can pick and choose. At present, if I got ten thousand dollars in advance, I'd be happy. And Arthur told me on the phone, "That's chicken feed. Is that all Farrar, Straus is offering you?" I said, "No, they haven't even offered. They just suggested the possibility of ten thousand dollars." He said, "Chicken feed!"

(Tape 5 at 58:4-14.)

STAAL: You know what Schopenhauer said, the difference between being young and being old? When you're young, and the telephone rings, you, but he really said it well, *Da Komnt es*, "Now it is coming." And then you are old and the telephone rings, and you say, *da komnt's*, "There it is."

MASSON: That happened even today. I mean, there is a sort of—The phone rang while Denise was there, and I said, "There's my future."

MALCOLM: Uh-huh.

MASSON: And, uh, it was long distance from New York, and he says --

STAAL: Denise your young [???].

MASSON: —[???] from Farrar Strauss, and, uh, we received your manuscript, we're very interested, we want to publish the book. And I got that certain, heart going, you know?

CAMMELL: But even—

MASSON: And, yeah, when you called—

CAMMELL: —when you—

MASSON: —when you called.

CAMMELL: It was so bizarre, he'd come back from, from um, France the night before and the phone rang and he said, he said something it was just incredible, I mean it was incredible, and there you were on the phone. Really amazing.

MASSON: And I, it's too good, I swear, I had had—

CAMMELL: [Simultaneously] Two calls like that, he said, today, "There's my future," and it was this person—

MASSON: I had the fantasy—

CAMMELL: —with money.

MASSON: —when I was in France, I was mad, when I had an interview with *Le Monde*, which is very prestigious in France, and

it will come out on Sunday, "Well, that's fine but it doesn't do me any good, I'm, I'm not there. I wonder why somebody like Janet Malcolm from *The New Yorker* doesn't phone me?"

(Tape 12 at 30-31.)

These were my three friends. Anna Freud, Muriel Gardiner and Kurt Eissler. Everybody else, like Wallerstein, hated me. Would have done anything to get rid of me. [???] Envious, and you know, they genuinely felt I was a mistake, and a nuisance. And a potential danger to psychoanalysis, a really critical danger. They sensed that. And they were right. "This man could single-handedly bring down the whole business."

(Tape 1 at 39:13 to 39:20.)

MASSON: Uh, and when these, this book comes out, it's, uh, I mean I really feel it spells the beginning of the end of psychoanalysis, and he's definitely going to blame me, as will every other analyst in the world for having done psychoanalysis an irreparable damage. But what they'll say beyond that is still a puzzle to me, how they're going to reinterpret the documents I've found so that it, on the contrary, uh, enhances Freud's image is totally mysterious to me.

MALCOLM: Um-hmm, um-hmm.

MASSON: Undoubtedly they will try that. But I don't think they're going to fool the whole public you know. I think that this book really is, uh, it's the end for them.

(Tape 21 at 19:16-27.)

MASSON: ...[W]hat I'm showing in all my work is that Freud said so for reasons that are not honest, and that's why analysts are so upset by it. Because if I am right, and it's very hard to prove that I am not, then they've got to say, "My God, what the hell have I been doing all these years to my patients?" And that's, that's the essence of this business. It's scary for analysts and I assure you that every analyst you talk to is going to be scared. They're not happy. And I don't think it's going to go away. I really don't. I don't think that this whole controversy is just going to disappear.

MALCOLM: No.

MASSON: But, that's what they'd like to say. "This is just another upstart, you know, Masson, like many people, feels that he knows more than Freud. It will cause a stir in the press because of this article in *The New Yorker* for a week or two and then it will die down and then we'll continue in our profession as we always have, searching for the truth." That's not true. It's not going to die down. It's not going to go away, and the reason it's not is because these things are written by Freud, not by me. Freud wrote these letters, I didn't. I just found them and patients are going to say, "What the hell is going on here?" They're already say (sic) it. I know it. I've heard it from analysts close to The American Psycho-Analytic. The office was swamped when all these articles came out.

MALCOLM: Yeah.

MASSON: With people calling saying, "What the hell is going on in analysis? What secrets are you guys keeping?"

"What secrets are being kept from us? What is going on in analysis?" Patients are asking that. "What, what, what is this about Masson? I mean, is this not true? Tell me why?" They're asking those questions and they're worried, and I don't blame them. I would be. If I had been a patient and somebody else had come along with all this information, I would have called him already and said, "Hey, wait a minute. This really affects me. I'm in analysis. I want to know. How are people responding to this? What's the analytic answer to this? Are they assimilating it? Are they taking it seriously? What are they doing about it?" I'd have been very worried and I think patients will be very worried and they will be worried for a long time to come. And they, the practice is going to diminish. People are going to stop going. I know it.

MALCOLM: Well, people are going to stop going when they stop having problems, and as long as people have problems they're going to go to some kind of therapist or another—

MASSON: Well, that's the problem. They're going to go to people that are a lot worse than analysts and I'm sorry but, you know, that's not my concern. It's like saying, "Well, what happens to all these students who want to do Sanskrit now that you've wrecked the department?" It's not my problem. It's my problem to find out if something's true or false, corrupt or incorrupt and afterwards, what gets done. It's not my concern.

(Tape 8 at 32:16 to 34:12.)

MASSON: Oh yes. Until, but, but then it switched, you see, once Eissler took me over, and I [???]—

CAMMELL: Then they all want you, huh?

MASSON: Then they suddenly, you know, "Our friend Masson." As long as I was within the hierarchy then I became, "Well, you know, we always knew Jeff would do well." "My friend, where have you been, I haven't heard from you in so long." "I understand you're head of the Archives, can you get me this, can you get me that?" And then they, then they start suddenly, "Would you help us with this, would you help, would you send us this, would you send us that?" Then I get thrown out of the Archives, and not a word of greeting any more. Now you cannot call that loyal friendship.

(Tape 12 at 16.)

MASSON: And most analysts are going to talk about it, too, with their patients. I know that they already are. If they say, "This is nonsense," then people are going to react a little bit like the Hartmann story: "Thank you very much. I won't be returning."

MALCOLM: Yeah.

MASSON: It's going to happen and I'm not, I don't care really. I mean, I don't feel, I mean, it's just not as if I have sleepless' nights over what I'm going to do to analysis.

(Tape 8 at 34:27 to 35:7.)

MASSON: Yeah, oh yeah, I mean there's certainly real historical [???] documents that deserve a study. I mean I could write a brilliant article about the tapes of the Archives.

(Tape 19 at 41:25-27.)

MASSON: Yeah, I think it really is, but I think you'll be glad that it is because I really feel that this is going to take a historical place, you know. It's, it's not just a, a, a pleasant article about some theme that's captured people's interest. It really is something that's going to be significant cause I'm absolutely convinced. The more I look at this, and like presenting it to somebody like Nancy Miller over the last three days, who came quite fresh and realizing the impact that the story finally has when they've absorbed all the information, I realize it really is going to affect the practice of psychotherapy. There's no question of it. So that I think that the, the material surrounding it is terribly important and I—

MALCOLM: Um-hmm.

MASSON: —I mean, and she also, Nancy Miller agrees with me that it's not my place to talk about it.

MALCOLM: Yeah.

MASSON: That in the book I'm not going to say anything about myself whatsoever, and what I did or how I found things or who I know or, but it is, it is the, the obvious question. Everybody's

gonna want to know: "How did this happen?" And at that point your article will be there—

MALCOLM: Um-hmm.

MASSON: —and that's absolutely perfect. I mean the timing couldn't be better. By the way, the book was sold to Faber & Faber.

(Tape 19 at 13:2-26.)

MASSON: Yeah, yeah, well he's, he's (Eissler's) going to have to write a whole library when my book comes out.

(Tape 19 at 4:22-23.)

MASSON: Oh, they'd just stall it forever. And they would hope that somebody would not call attention to anything. Not that I have, mind you. I have been very careful not to use it as a, uh, loudspeaker for my views. There are no, I mean I don't even say, "Note what Freud says," I just simply annotate it in a purely historical manner, but I think that they're so frightened—Anna Freud was and Eissler of what this, the implications, the full implications, I mean, that's the book that's going to bring down psychoanalysis. Uh, not mine, but only because my book is there, you see—

MALCOLM: Yeah.

MASSON: —it wouldn't have without mine; it would have taken

years before anybody would have picked up anything.

(Tape 17 at 55:2-14.)

MASSON: I hope not. God, I really want it to come out, I mean not just because it provides, you know, proof of my theory but because it is such an important work.

MALCOLM: Sure but everybody wants it. I mean, I would think all analysts would—

MASSON: All analysts—

MALCOLM: —be interested in this.

MASSON: Well, of course they are. But I think that somebody like Eissler—You should have asked him directly, "Do you want this to appear?" I mean I don't think he does want it to appear.

(Tape 17 at 53:14-24.)

MASSON: I know that some people like me enormously, really take to me and then are very loyal to me, and others hate my guts from the beginning. But I didn't entirely understand that I would have such a catalytic effect on analysis.

(Tape 16 at 16:25-28.)

MASSON: That's right and you know, it's like having one good friend. You know, you need that and when you suddenly discover

you're really alone, like I discovered that night at Eissler's, you know, looking around me and here were thirteen men and two women who had all been around, you know, they'd all done analyses for umpteen years, uh, there was no reason for them not to see what I was saying, and say—a little bit like Furst said afterwards, not at the time but, you know, I expected them all to say right at the time: "Look, Masson, of course you're right; of course these things exist; wonderful that you found them but, you know, this just isn't the way to go about it. We are a profession and we're going to get destroyed if you do this. Now we understand that you have to do it but you should really understand, you can't be part of the Archives," uh, and I would say, "Yeah, I see that." And had Eissler said that to me, "How can I ask you to be running the museum in Anna Freud's house when you yourself are discovering so many unpleasant things about Freud? Of course they're there. Of course they're real. Of course your interpretations are correct. You're a historian but then you shouldn't want to be part of this." And I would say, "Well, you know," I'd say, "Yeah, I guess you're right." He'd say, "The only honorable thing to do, Jeff, is to resign." And I'd say, "Yes, yes, you know, I, I see, you're right. I understand that." But that's not what they did. You know what they had to do was trivialize what I had found, pretend that I was some sort of, uh, narcissistic uh—

(Tape 17 at 12:18 to 13:15.)

MASSON: —you know, all the qualities I knew he (Eissler) had, he still has. Uh, I was surprised that he showed such cowardice. I mean I was convinced that he would say to these thirteen men: "Fuck you," you know, "I don't care what you think. I've never

cared before. I don't care now."

MALCOLM: Yeah, yeah.

MASSON: "And I, I don't expect you to like Masson. Just shut up and do what I tell you." [laughs] You know, sort of thing. I was just amazed at his cowardice and then I was amazed that he didn't have the guts to say to me: "Look, you're a hundred percent right, uh, you haven't done anything wrong, but this is a yucky world and, uh, I have to play by the rules and I'm kicking you out."

(Tape 20 at 18:10-22.)

MASSON: And I would go to this Clark Institute of Psychiatry which is now, you know, I consider one of the rat holes of the world.

(Tape 20 at 27:26-28.)

MASSON: I mean it really, I mean in a sense there is, I mean I do understand one point, namely that I was given access to these documents in the belief that I would enhance psychoanalysis. And what I have done is use these documents to destroy psychoanalysis. Now I understand that but I, I don't feel responsible for that.

(Tape 21 at 18:17-22.)

MASSON: Oh yeah, oh yeah, I mean, you know, I really believe this book that I'm writing is not, you know, it's not just an

opinion. It is the truth.

MALCOLM: Yeah.

MASSON: I mean that's true. It's historical stuff and you know, sooner or later it's going to be recognized. I mean cause it's not my opinion.

(Tape 22 at 17:19-25.)

MASSON: It's true. That's, that's what he (Eissler) would have said: "Never let it out. It's just between the two of us. We can know this. We're strong enough to digest it. But anybody else, it would collapse—It would be the beginning of the end of psychoanalysis." And the, of course, then the next step would have been to say: "But, Dr. Eissler, surely we don't have the right to hide away information simply because it's going to destroy a profession, if it's the truth?"

(Tape 22 at 18:14-21.)

MASSON: And, uh, I mean it's sad, you know. I can't really believe that there's anybody who will appreciate this book I've just written more than Eissler.

MALCOLM: Yeah, yeah.

MASSON: In some way. I mean he'll never admit it. He gonna, you know, he'll kill himself when he reads it. It's gonna destroy him. But I mean, he will, he will be utterly fascinated by it.

'Cause it's exactly the kind of scholarship he admires.

(Tape 22 at 22:21 to 23:4.)

MASSON: But I—She's not terribly, you know, not unusually bright and she doesn't know much. Well, as you'll discover, most analysts don't know really anything about the history.

(Tape 19 at 47: 18-20.)

MASSON: But I don't think that's entirely honest 'cause I think, like you, I think that he (Eissler) really did know somewhere that I wouldn't do what he did—that I would do much more. And be much braver and that these are the things he couldn't do, but secretly wished to do.

(Tape 19 at 36:11-15.)

MASSON: Sure, well, listen, you have to keep your total freedom for it and, you know, just do what has to be done, uh, I don't think, you know, I mean certainly for you it doesn't matter if it comes just before or just after the book and I don't think really, you know, I mean my concern cannot be with how well the book sells. I think the book's going to sell on its own because of what's in it and—

MALCOLM: Definitely, that's right, yeah.

MASSON: —it just has to take its chances out there in the real world and tha,'s—

MALCOLM: Well, you've got a good publisher, that's, that really—

MASSON: I've got a good publisher and *The New York Times* is definitely going to do the story before the book comes out—on the book, and I, you know, even my typist, just some ordinary typist typing it, she said, "God, I can't imagine what analysts are going to say."

(Tape 17 at 41:14 to 42:2.)

MASSON: I can't imagine any analyst reading that (Masson's) book and coming away indifferent.

MALCOLM: Yeah, yeah.

MASSON: It's just not possible, you know, it's just too, the material itself is just too powerful, uh, all this stuff so, but I'll see—I'm going to have some idea. They've asked me to give, uh, a big lecture in May here on Emma Eckstein.

MALCOLM: Um-hmm.

MASSON: Emma, uh, Freud, Fliess and Emma Eckstein, at the university, so, uh—

MALCOLM: So you'll get a sense of the reaction?

MASSON: I'll get a sense of the reaction from that. I'm really kind of curious.

MALCOLM: Will there be analysts at that lecture too, or or no?

MASSON: Oh yeah, I'm sure they'll come, yeah, cause it's being widely advertised so they'll all come into it, uh, but I, you know, I more or less know, I don't really know what the analytic reaction will be when they actually see this stuff in cold print but I know that it's not going to be a minor one, I mean, they're going to get really upset and especially in the new version. It's much tighter, you know, and the whole thing, it's just more, in a way uncompromising. It doesn't let you go, you know.

MALCOLM: Um-hmm, um-hmm.

MASSON: And I think one of the problems with the earlier version, the one you said, is that I gave so much material and so many other opinions that people could be deflected.

MALCOLM: Um-hmm, um-hmm.

MASSON: And deal with, with things, but I think this way they're going to be forced to deal with the issues.

MALCOLM: Um-hmm, um-hmm.

MASSON: Which I really think are important ones. I really do. And I, I just can't believe that it's not going to affect analysis.

(Tape 17 at 43:3 to 44:9.)

MASSON: He writes beautifully. He writes very well and very

clever and he's good, you know. But he's not a discoverer in the way I am. He won't go out and find new things. He waits until you bring it to him and then he'll look and say, "Yes, I see." But he gets bored very easily. He'll say, "Okay, I see it, don't bother me." He mainly spends his time mocking the people who don't do that. [laughs] At which, he's very good and the two of us together is devastating. If there's some poor guy around who's not as quick as we are, I mean, it's just terrible. People hate us. We're a terrible team.

MALCOLM: [laughs] And talking with Indian accents.

MASSON: [laughs] And talking with Indian accents to boot, I mean unbearable, no question of it, but yeah, no, I didn't enjoy talking to him as much as I enjoyed talking to Terri because she can really think and she's always more deep than I was about everything she'd done. And it was very exciting for a while and I think the two of us, I think that was what our marriage was, you know, a real hive that we had, a real intellectual hive. I can't think of any two people that have ever had a more intimate intellectual relationship than Terri and I.

(Tape 13 at 40:9-28.)

MASSON: Aaah. This is critical. This is really where it all started.

MALCOLM: And you found this in Anna's cupboard?

MASSON: The whole story and it is, I mean, that's, that is the

wedge that's going to topple psychoanalysis. That story.

MALCOLM: But if you topple it and it's the best show in town, and then you're going to have no show.

MASSON: Right.

MALCOLM: So what is, what is everybody going to do?

MASSON: Well, that's a good question. But that's another question. [laughs] I mean, that's not, that's not my business.

MALCOLM: Because everybody [???]

MASSON: I mean, in a sense Eissler could say that. Suppose Eissler were like you, listening, and he says: "You know, you're right. I've looked at all the evidence, I've read it, you're a hundred percent right. But are you aware that if you go out and say this, if you publish this in *The New Yorker*, *The New York Times*, and you publish your book, do you realize what you're doing to the public? Do you realize you will—psychoanalysis will disappear as a profession and what will replace it, Masson? Huh?

(Tape 2 at 5:1 to 22.)

MASSON: And I realize—you know, Fichtner was trying to explain it when I was here. He said, "Look, Jeff, you've got to understand that people like that and me," he said, "you know, spend our lives desperately searching for one single unpublished Freud letter, and we get it and you look at it and say, 'Ech, it's not

so interesting,' because you were given thousands of letters. It's just not fair. You've got to put yourself in our place." And, of course, he's right.

MALCOLM: Um-hmm.

MASSON: I mean, for a Hartmann or a Swales or a Fichtner, you know, they turn up one thing, it then becomes part of their life.

MALCOLM: Yeah. Yeah.

MASSON: And to have someone who then has hundreds and thousands of these look at it, and you know, say, "Yeah, big deal," it's like telling some, you know, peon in South America, who discovered a tiny little diamond and brings it to De Boer, you know, for De Boer, it's nothing; for him it's his life.

(Tape 3 at 45:6-23.)

MASSON: I mean, I've had people say to me, "I have spent my life trying to get one letter of Freud's, and you go there and Anna Freud opens up her bloody desk to you. Why? Why you, you little son-of-a-bitch? What did you do?" And I said, "Well, I don't know." In Chicago that was actually a question from the audience. One of the senior analysts said, "I just want to ask one question. Why you? Who's ever heard of you? We've never heard of you. You're not famous. You haven't written much. You're a nobody. Why should you get all these privileges and we get nothing?"

MALCOLM: How did you answer that?

MASSON: I finally said, "Because I'm smarter than you."

MALCOLM: [laughs]

MASSON: Which is true. "And I know more, too, and I've got more guts and I asked. And I mean, there are all kinds of reasons, and I'm actually very good at what I do," and so on and so forth.

(Tape 5 at 33:10 to 33:26.)

MASSON: Well, but you see, then you have to realize it wasn't just Eissler. If it were just Eissler, and it was just a question between me and Eissler, me and Calef, I mean, okay, it's me and the whole of psychoanalysis, as you'll soon see.

(Tape 12 at 10-11.)

MASSON: I liked the fight but I was in a very strong position in a way. They had really nothing to say beyond, "We're going to fire you because Eissler's told us to." They didn't know anything else and I knew everything and Eissler knew everything. So, I had a lot to say and they really had nothing to say and I could show them up for the cowards they were and I guess I got a certain pleasure from that unfortunately. I would have wanted one friend to be there, someone like Bob or Terri, just one witness of what was going on.

MALCOLM: Yeah, yeah, that's too bad that—

MASSON: It would have pleased me enormously because I was doing, I mean, in effect, I was taking on, it's like, you know, these

child fantasies or these Kung Fu movies, you know, where Bruce Lee takes on fifty men.

MALCOLM: Yeah.

MASSON: It was that kind of thing, you know.

MALCOLM: Yeah.

MASSON: There were these thirteen older men, grown up, training analysts, every single one of them fighting me, and they were losing badly. I mean, they just were no match.

(Tape 6 at 45:1-20.)

MASSON: I want to know what analysts are going to say when my book comes out. I'm really curious because they can't dismiss it the way they can dismiss Sulloway or Roazen. It's not light-weight like Roazen; it's not pretentious like Sulloway. There are new documents. There is no way they can dismiss it. I know that. That is, no serious scholar is going to be able to say: Well, this is just nonsense. They are going to be utterly dumbfounded, and I really believe it is true. Everything I say in there is true. And I think it's going to have a slow effect. I think it's going to eventually break the edifice apart. Just because people are going to hear about it. By luck, it's become well known already. I mean, there is going to be a big press about it, and it's going to be read by a lot of people, and it's going to sink in. You know, patients are going to read it and say: Jesus Christ, if this is really true, and it sure looks that way, what the hell am I doing with this

man?

MALCOLM: Are you saying that everybody in this profession is corrupt, beginning with Freud?

MASSON: Yes.

(Tape 5 at 16:28 to 17:19.)

MASSON: Yeah, my own book. See, I'm not going to interpret in that book. Like I'll give that passage; I won't say a thing. I'm not going to say—

MALCOLM: Will you write an introduction?

MASSON: Yes, a long introduction, but purely scholarly: all the new information I've discovered, but nothing interpretive, nothing, what a shit Freud was [laughs], nothing, just—

MALCOLM: And this will replace that old—?

MASSON: Yeah, *The Origins of Psychoanalysis*. Kris and Anna Freud and Maria Bonaparte.

MALCOLM: When will it come out?

MASSON: I hope September.

MALCOLM: Then both books will come out in September?

MASSON: That's what I'd like.

MALCOLM: Um-hmm.

MASSON: But I think it's going to take longer. It's a, it's a huge three volume work, the Letters, so I don't know. It may take longer. But that is definitely going to shake analysis, too, and that won't be my fault because all I've done is edit the Letters.

(Tape 5 at 24:1-20.)

MASSON: It was the publicity. He said, "If you had published that article in *The Journal of the American Psycho-Analytic Association*, I would have had no objection, but that you went to *The New York Times*, that, that's it, that's what did it." And I reminded him, "I didn't go. You sent them." He said, "Well, you should have been more discrete." I said, "Okay, so I was somewhat indiscrete." "You showed poor judgment." "Fine, I showed poor judgment. Is that any reason to destroy my career?" "Yes." But then, why? The question is why? You see it wasn't just really around me. That's the, that's the whole point. I mean, there was some sense in which they were smarter than I was. They sensed underneath this was a whole groundswell and once this was totally out, all these things I had discovered, it would end up by toppling the business of analysis, and that I really believe. I believe that it's got nothing to do with me, and there's no way I can stop it then when my book comes out and all of this is known, it is going to be the beginning of the end of analysis as a profession.

MALCOLM: Do you have a name for your book yet?

MASSON: Well, I call it, "The Assault on Truth," but I don't like the title.

(Tape 9 at 30:2-22.)

THE BOOK

"[Eissler] was always putting moral pressure on me. 'Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman.' I said to him, 'What have I done? *You're* doing it. *You're* firing me. What am I supposed to do—be grateful to you?' 'You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence.' 'Why should I do that?' 'Because it is the honorable thing to do.' Well, he had the wrong man."

(*In the Freud Archives*, page 67.)

THE TAPES

MASSON: [Eissler] was constantly putting various kinds of moral pressure on me and, "Do you want to poison Anna Freud's last days? Have you no heart?" He called me: "Have you no heart? You're going to kill the poor old woman. Have you no heart? Think of what she's done for you and you are now willing to do this to her." I said, "What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you?" He said, "Well, you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence." "Fuck you," I said, "Why should I do that? Why? You know, why should one do that?" "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?" Well, he had the wrong man. Really, I mean, that's just not, not for me.

(Tape 9 at 42:6-21.)

MASSON: She [Anna Freud] never directly attacked me. On the phone she was quite gentle. I mean, she was honest. She said, "My father would never have wanted somebody like you living in this house," which is true I am sure. I understand that. She was upset. She felt that Eissler had lied to her, which he had—I don't know if he had, but he certainly hadn't been totally straightforward with her. Uh, she was upset because she knew that I was in possession of all these documents, and what would happen now? She probably felt that Eissler was making a mistake. At least,

that's the impression I got. Then I agreed, right then and there, I told her, "I'm going to sue Dr. Eissler," and she didn't even object to it. And I did say, however, "I will, I will keep my promise not to publish all this material in such a way that will embarrass you." I didn't want to say, "till you die." But I mean that was clearly—

MALCOLM: Yeah.

MASSON: —the implication.

MALCOLM: Yeah, yeah.

MASSON: And I kept that and to be quite honest, I must confess that I did give that up a few months ago on the grounds that I was told, and I don't want to say by whom because that really shouldn't be said, but I was told very—it's somebody who had heard it directly from her—that I should now be dropped from the Copyright. And I felt that that was unfair, that if she wanted to keep out of the whole thing, I could understand that, if she said, "Look, this is between you and Eissler or whoever, but I'm not involved, my relationship to you doesn't change," then I would retain, I would do for her what I said I would do.

MALCOLM: Um-hmm.

MASSON: But the minute that she, behind my back, started trying to get me off various committees and so on, that I didn't like and I felt that released me then from any obligation not to publish during her lifetime. And I was prepared, in fact, to go ahead with this publication in Germany with Suhrkamp, uh, no matter what

effect it would have on her. And I knew it would have a devastating effect.

MALCOLM: But as it happened, she died.

MASSON: As it happened, she died.

(Tape 9 at 25:23-27:5.)

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In the Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY M. MASSON,
Petitioner

vs.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. AND
JANET MALCOLM,
Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
Counsel of Record
101 California Street
Suite 1600
San Francisco, California 94111
Telephone: (415) 433-1900
Counsel for Respondents
OF COUNSEL: JOSEPH H. COOPER
THE NEW YORKER
25 West 43rd Street
New York, New York 10036

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CERTIFICATE PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Supreme Court Rule 29.1, respondents provide the following information on the corporate parties and their parent corporations.

The New Yorker Magazine, Inc., Respondent

Alfred A. Knopf, Inc., Respondent

The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., are owned, through intermediate corporations, by Advance Publications, Inc. All are privately held corporations.

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

Respondents file the following Supplemental Brief to address the assertions made by two *amici curiae* in support of petitioner Jeffrey Masson and *amici's* criticisms of the lower courts' opinions.

II. *AMICI'S* ARGUMENTS ARE MISPLACED. BY ENSURING THAT QUOTATIONS DO NOT ALTER THE SUBSTANCE OF UNDISPUTED REMARKS, THE TWO LOWER COURTS' OPINIONS PROTECTED AGAINST PUBLICATION OF CALCULATED FALSEHOOD.

Both *amici*, Mountain States Legal Foundation (hereafter "Mountain States") and Center for Individual Rights (hereafter "CIR"), make dire predictions about the consequences of the Ninth Circuit's opinion. With sweeping generalities, but with little or no discussion of the facts of the case, the two *amici* claim that the Ninth Circuit and the District Court have permitted or encouraged knowing falsification of quotations. See, e.g., CIR *amicus* brief at 3-4.

Respondents submit that this is a gross mischaracterization of the Ninth Circuit's ruling. The Ninth Circuit held that actual malice cannot be inferred when quotations do not alter the substantive content of undisputed remarks made by a public figure. (895 F.2d at 1539.) It found that every statement challenged by the petitioner was either derived directly from tapes or substantially true.[1] In light of the Ninth Circuit's standard and its application—

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[1] *All* of the disputed quotations which were not derived directly from the tapes were held to be substantially true. (See 895 F.2d at 1539-43, holding that challenged quotations did not alter the substantive content of undisputed remarks.)

an application that is not seriously challenged by either petitioner or *amici*—it cannot fairly be contended that the lower courts have condoned knowing falsification, or falsification of any kind. The gist of this case is that if there is no substantial falsity, there is no basis for inferring *knowledge* of falsity. The *amici's* assertion that the Ninth Circuit permitted, encouraged, or condoned knowing falsehood is utterly unfounded.

In a significant concession, CIR acknowledges: "Most people speak less carefully than they write. For this reason, journalists occasionally 'alter' an interviewed person's remarks in order to remove hesitations, stammerings or syntactical lapses that would make the speaker appear less than intelligent. Thus the public may not always receive a speaker's unadorned statements." CIR *amicus* brief at 5, fn. 2.

Having thus suggested that the issue of quotations is not black and white, CIR is unable to draw the line anywhere except where the Ninth Circuit drew it. CIR asserts, "When a quotation is altered in substantive content, or entirely fabricated, a writer strips the expression of the speaker's distinctiveness and replaces it with his own." CIR *amicus* at 6. *This is not materially different from the Ninth Circuit's standard:* the Ninth Circuit held that malice *could* be inferred in cases of complete fabrication, or when the quotations "'alter the substantive content'" of the subject's remarks. 895 F.2d at 1539, quoting *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977), *cert. denied sub. nom. Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

The Ninth Circuit fully protected the reputational interests at stake here. It found that the challenged quotations (comprising a few words in a text of 48,500 words) did not alter the substance of what Mr. Masson said in recorded interviews, and in three instances were rational interpretations of ambiguous tape-

recorded remarks.[2] The Ninth Circuit *did not* extend First Amendment protections to quotations that have been either wholly made up or so intentionally distorted that they would foreseeably create a false and defamatory impression of the purported speaker.

In place of the majority's standard, CIR proffers the dissent's five-part standard. CIR *amicus* at 16 fn. 7. But an examination of the dissent's standard simply leads back to the majority's. For example, the dissent concedes that changes in quotations "are not actionable" if they are not "material" and "do not go to the *substance* of what the speaker has said and are irrelevant to the *content* of his communication." 895 F.2d at 1564, emphasis added. The dissent's concession that changes which do not go to the "substance" of a conversation and do not affect the "content" are not actionable is really not much different than the majority's standard, which would not infer malice when quotations do not "alter the substantive content." 895 F.2d at 1539.[3]

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[2] It is worthwhile noting that of those quotations found by the Ninth Circuit to be "rational interpretations" of ambiguous remarks, all conversations were on tape. See 895 F.2d at 1544 [discussing quotation "Eissler would have admitted I was right"] and 1545-46 ["aren't too many interpretations possible" and "he had the wrong man"]. Masson's allegation with respect to these latter quotations is that they were "misleadingly edited," not "fabricated." In any event, none of these quotations are even discussed by the *amici*.

[3] The dissent has been criticized for coming "perilously close to adopting . . . a per se rule" of actual malice, and for losing sight of the meaning of actual malice for First Amendment purposes. White & Sheridan, "In Defense of Poetic License," LOS ANGELES LAWYER (April 1990) 28, 52. The only specific example of an "immaterial change" the dissent offers would be deletion of a subject's stammers. 895 F.2d at 1565 fn. 20. Such an expansive definition of "material" changes in a subject's words could prompt a surge of libel litigation from public figures who regret their own words or forget having uttered them, and could impose liability without either substantial falsity or fault.

At issue, then, is not so much what legal standard to apply as a difference of opinion about whether the quotations attributed to Mr. Masson altered the substantive content of his undisputed and unambiguous remarks. This difference is certainly not one which warrants review by this Court. Moreover, in view of the consensus by three of four *judges* who have considered the voluminous record that there were no substantial changes in the content of Mr. Masson's words, it simply cannot be said that the *writer* herself *subjectively* "entertained serious doubts" about the truth. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Reader's Digest Assn.* v. *Superior Court*, 37 Cal.3d 244, 256-57, 208 Cal.Rptr. 137, 690 P.2d 610 (1984), *cert. denied sub. nom Synanon* v. *Reader's Digest*, 478 U.S. 1009 (1986). Without such a showing, by clear and convincing evidence, there is no actual malice.

Respondents have not argued, and do not argue, that there can never be defamation by misquotation. And the Ninth Circuit did not so hold. It did not create an immunity for malicious fictionalizing or willful distortions. The Ninth Circuit simply upheld the findings of a District Court which had looked at petitioner/plaintiff's five different complaints and found in them no creditable assertion of substantive misquotation animated by actual malice.

The Ninth Circuit correctly ruled that there was no basis for the assertion of actual malice because there was no substantial falsehood. If the plaintiff has been thrown out at first base, there is no way he or she can get to second. For purposes only of summary judgment, the Ninth Circuit characterized the alleged departures from undisputed tape-recorded interviews as "fictionalizations" and "fabrications." Still, the Ninth Circuit found that those alleged misquotations were not substantially false—and thus could not be deliberately and calculatedly false, as CIR tries to insist.

Even if petitioner's exact words were edited and consolidated, they were not distorted. Nor were they imagined. In *every* instance, the alleged misquotations are substantially similar to and corroborated by the undisputed tape-recorded interviews.[4] Respondents urge that the Appendix to their Brief in Opposition to the Petition for Writ of Certiorari convincingly demonstrates that the Ninth Circuit was correct in finding that the petitioner in this case was not misrepresented. *A fortiori*, there is no evidence—much less clear and convincing evidence—of actual malice.

CIR next asserts that the Ninth Circuit found evidence of actual malice "irrelevant" (CIR *amicus* at 2) and "assumed" that the challenged quotations were made with actual malice. (CIR *amicus* at 13.) Both sweeping assertions are made without benefit of citation and both are, in fact, entirely incorrect.

The Ninth Circuit addressed a circumstance in which the writer insisted that she had quoted the subject accurately and "invented nothing" (Malcolm Decl., CR 95, ¶ 10, 686 F.Supp. at 1398)[5] and had notes and tapes to back up her assertion. (Ex. B to CR 95, Supplemental Excerpt of Record in Ninth Circuit at 28-31; see also 686 F.Supp. at 1398, fn. 4.) The issue was whether, if Masson's factual contentions were believed, actual malice could be "inferred." The Ninth Circuit never "assumed"

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[4] In a few instances, the quotations are taken almost verbatim from the author's (Malcolm's) notes. Respondents' Appendix at 2-3, 20-21, 28-29.

[5] There is certainly no direct evidence of actual malice. Malcolm's declaration states, "I quoted Mr. Masson accurately, I presented him as he presented himself to me, and in writing my article/book I was consistently and solely guided by the ambition of making him as lifelike and real as possible so that my readers would get the same sense of him that I had received from actually knowing him. I invented nothing . . ." CR 95 at 5, quoted in District Court's opn., 686 F.Supp. at 1398.

that Janet Malcolm had acted with actual malice or "entertained serious doubt" (*St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968)) about the truth of the publication. It simply "assumed," for purposes of summary judgment, that Masson had not said, verbatim, certain words he was quoted as saying. 895 F.2d at 1537. That, of course, does not equate with a finding of actual malice. *Bose Corp.* v. *Consumer's Union*, 466 U.S. 485, 512 (1984); *see also Clyburn* v. *News World Communications*, 903 F.2d 29, 35 (D.C.Cir. 1990) [assuming a jury could discredit reporter's testimony, "such a factual vacuum would not be the same as 'clear and convincing evidence of actual malice'"; summary judgment for publisher affirmed].

CIR cites Sack, LIBEL, SLANDER AND RELATED PROBLEMS (Practicing Law Institute 1980) § II.4.9, but fails to observe that treatise's conclusion that the theory of defamation by quotation

> "must be employed with caution. Quotations are commonplace, the core of many news articles and published opinions. The people quoted commonly complain, rightly or wrongly, that the quotations are inaccurate, and are particularly likely to do so after adverse public reaction to publication of what they said. . . . If courts are not careful to require a showing of substantial, deliberate fabrication or alteration of a plaintiff's remarks and that the fabrication or alteration itself makes genuine injury to reputation a realistic likelihood, lawsuits based on this theory could pose a threat to the ordinary, unobjectionable exercise of reportorial and editorial functions."

Id. at 67-68.

Petitioner has not demonstrated any substantial alteration of his comments (as two courts have now found), nor has he shown any likelihood of injury to reputation as a result of the disputed quotations (as distinguished from the undisputed quotations). His lawsuit, if revived, could pose a substantial threat to the ordinary and unobjectionable practice of quoting from notes and selecting appropriate quotations from a multitude of tape transcripts and notes.

In its *amicus* brief, Mountain States announces that the Ninth Circuit's opinion "in one fell swoop, demolishes nearly two hundred years" of balancing between free speech and reputation. Mountain States *amicus* at 7. Mountain States made an equally sweeping condemnation in supporting petitioner's request for rehearing and rehearing en banc in the Ninth Circuit, warning that without rehearing "the goal sought by our Founding Fathers, a free and open discourse on issues of public concern... will be destroyed." Mountain States' Brief *Amicus Curiae* in Support of Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, filed September 13, 1989, at 8. Mountain States cites no evidence, however, that in the approximately one year which has passed since this warning, public figures have shied away from speaking to the press, or that the accuracy with which they are quoted has lessened. There is no evidence to support Mountain States' bold prophesy[6].

Behind their rhetoric, both *amici* are tacitly suggesting that the constitutional protection afforded a writer should be deter-

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[6] Interestingly, the two *amici* offer completely opposite views of how public figures present themselves to the press. Mountain States asserts that business leaders and politicians have learned to be "careful and precise" in speaking to the press (Mountain States *amicus* at 5), while CIR comments, "Most people speak less carefully than they write." CIR *amicus* at 5 fn. 2.

mined by punctuation marks and by whether a writer has tapes or notes. Neither *amici* seriously challenges the substantial truth of the quotations attributed to Mr. Masson, and neither mentions that the writer has notes of all untaped quotations. Both *amici* make the unstated assumption that there is some legal or ethical transgression in untaped interviews. This suggestion finds no support in applicable cases, nor should it. *See, e.g., Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 625-26 (2d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 145 (1989) [court considers reporter's notes in rejecting allegations of actual malice based upon misquotation at summary judgment stage]; *Fletcher* v. *San Jose Mercury News*, 216 Cal.App.3d 172, 188-190, 264 Cal.Rptr. 699 (1989) [reporter's notes, which were equivocal, considered as court finds no actual malice despite alleged misquotation]. Despite the *amici's* attempts to make this case into something it is not, there is no evidence of actual malice in the face of (1) the writer's insistence that she quoted Mr. Masson accurately and "invented nothing," (2) the notes of a conversation which Mr. Masson admits took place, containing references to matters admittedly discussed, and (3) tapes which substantiate the untaped quotations.

III. NONE OF THE PURPORTED CONFLICTS CLAIMED BY *AMICI* EXIST

Amici claim a number of conflicts. None exist.

CIR asserts a conflict with *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974). CIR *amicus* at 13. *Cantrell*, a "false light" case, is virtually identical to *Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976)—in both cases, the writers described interviews that had not occurred. This Court in *Cantrell* observed that there was "no dispute during the trial" that the reporter, who did not testify, "must have known that a number of

statements in the feature story were untrue." He painted a detailed portrait of a woman whom he had not interviewed. *Cantrell, supra*, 419 U.S. at 253. There is no conflict between this case and *Cantrell*, or between this case and *Carson*.

Mountain States blasts the Ninth Circuit's decision with assertions that it conflicts with virtually every First Amendment decision this Court and others have ever written. Mountain States *amicus* at 7-15. These contentions lack merit.

This Court in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) held (per Justice White) that to satisfy the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) "reckless disregard" test, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. This Court stated, in dictum, that "[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based solely on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." Id. at 732.

In this case, of course, the writer has stated that she invented nothing, and that she quoted Mr. Masson accurately. Cr 95, ¶ 10. Even if this testimony is disbelieved, there are 40 hours of tapes, and a 1,056 page transcript of them, so there can be no argument, as there was in *Carson*, that "a story is fabricated by the defendant." Nor can there be any argument that the quotations at issue are "inherently improbable"—indeed, any comparison of the alleged misquotations with the tape transcripts and the notes in Respondents' Appendix shows the quotes are entirely in keeping with petitioner's undisputed tape-recorded statements. If anything is "inherently improbable," it is Mr. Masson's assertion that Janet Malcolm invented her notes, which contain material covering sub-

jects and people Masson admits he discussed with Malcolm on the very day she took the notes. Respondents' Brief in Opposition at 25-26. In short, the Ninth Circuit's decision and that of the lower court were faithful to *St. Amant*.

CONCLUSION

The *amici* have hitched their wagon to the wrong case. Respondents urge careful consideration of what this case *is*, and what it *is not*. This case *is* about 40 hours of interviews given by a public figure who unreservedly sought the limelight for his controversial theories, who volunteered irreverent criticisms of his former colleagues and benefactors, and who offered boastful self-appraisals and intimate details of his personal life. This case *is* one in which the writer has 40 hours of tapes, and notes as well, which show the substantial truth of the quotations. This case is *not* one about a private figure; it is *not* about a fabricated interview; and it is *not* one in which there was a material disparity between the words uttered, and the words quoted. For all those reasons, the *amici's* concerns are unfounded. This case is *not* one that merits this Court's further attention.

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
Counsel of Record

OF COUNSEL: JOSEPH H. COOPER
THE NEW YORKER MAGAZINE, INC.

August, 1990

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No. 89-1799

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

JEFFREY M. MASSON,
Petitioner

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC, AND
JANET MALCOLM,
Respondents

PETITIONER'S REPLY TO BRIEF AND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES O. MORGAN, JR.
Counsel of Record

PAUL RICHARD KLEVEN
Law Offices of Charles O. Morgan, Jr.
450 Sansome Street
Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioner

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INTRODUCTION

By his petition, Jeffrey M. Masson asks this Court to review a decision of the Ninth Circuit Court of Appeals that allows and encourages writers to substitute manufactured quotations for the actual words of public figures. The Ninth Circuit granted summary judgment in favor of respondent Janet Malcolm and her publishers even though it was "uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson." (App. A at A-31). Petitioner contends that respondents' attribution to him of deliberately altered, defamatory quotations was a "calculated falsehood" not entitled to any First Amendment protection.

The Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Brief in Opposition") asserts that petitioner seeks to impose liability on any writer who departs from full, verbatim quotation. Respondents argue that the decision was correct because Malcolm's disregarded notes prove that Masson actually made the disputed statements and, even if he did not, Malcolm's deliberate changes did not substantially alter the content of Masson's words. Finally, the Brief in Opposition cites newly discovered cases in the Second, Fourth and Fifth Circuits which purportedly support the Ninth Circuit's decision below.

In the Supplemental Brief of Respondents In Opposition to Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit ("Supplemental Brief"), respondents argue that there is little difference between the majority and dissenting opinions below, and that under either rationale Malcolm's alterations were not substantially false.

REASONS FOR GRANTING THE WRIT

Contrary to the Brief in Opposition's claim at 1, 11-13, Masson does not hope that this Court will force writers to become mere transcribers of ungrammatical, interminable, tape-recorded interviews. Journalists and writers are certainly protected when they make immaterial changes, irrelevant to the content of a person's statements, in order to correct grammar or syntax. (App. A at A-74-75) (Kozinski, J., dissenting). Quotes need not be lengthy to be accurate, and if respondents had been willing to check the accuracy of their quotations, as Masson requested, they could have published articles containing dozens of quotations with no danger of litigation.

Respondents, however, were more interested in sensation than accuracy; they did not simply want to repeat Masson's relatively bland statement that analysts felt he "was a private asset but a public liability," so they deliberately invented the much more provocative confession of self-loathing: "I was like an intellectual gigolo." (App. A at A-12-13). This defamatory fabrication was not merely an inconsequential change in terminology, as respondents claim, and Malcolm took similar liberties with other passages, repeatedly falsifying their tone and content to illustrate Malcolm's opinions of her subject. (See discussion in App. A at A-39-49 (Kozinski, J., dissenting).

Neither the Ninth Circuit nor respondents has stated a persuasive reason for encouraging these deliberate falsifications. The new cases cited by respondents, though illustrating the pervasiveness of altered quotations, provide no support for the Ninth Circuit's decision. The other Circuits denied liability under very different circumstances without

sanctioning the deliberate fabrication championed by respondents.1/

Apparently uncomfortable with the full implications of the Ninth Circuit's rationale, respondents repeatedly refer to Malcolm's discredited notes to establish that she actually altered nothing. (Brief in Opposition at 1, 4, 6, 6 n. 4, 11, 14, 17, 18, 20, 21, 25). Respondents deride Masson's contention that the notes were fabricated (Brief in Opposition at 25), but unlike the plaintiff in Contemporary Mission, Masson presented substantial evidence that Malcolm did fabricate the notes. (See discussion in App. A at A-44-45 n. 7) (Kozinski, J., dissenting)

Under Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), the Ninth Circuit could not consider the disputed notes, and its holding is meant to protect quotations that were "deliberately altered" as long as the alterations were not, in the Court's view, substantive. (App. A at A-5, 10-

1/ In both Southard v. Forbes, Inc., 588 F.2d 140, (5th Cir.), cert. denied, 444 U.S. 832 (1979), and Tate v. Bradley, 837 F.2d 206 (5th Cir, 1988), the Court determined that the quotes were not defamatory. Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 625 (2d Cir. 1988) cert. denied, 109 S.Ct. 145 (1989) found no basis for doubting the writer's good faith or the authenticity of contemporaneous notes, while Ryan v. Brooks, 634 F.2d 726, 729, 733 (4th Cir. 1980), involved only a paraphrasing of newspaper articles which did not purport to be a direct quotation of the plaintiff. Readers, of course, "give far greater weight to direct quotations than to descriptions or paraphrases by the author" (App. A at A-37 (Kozinski, J. dissenting). These cases reinforce the approach to this issue taken by Judge Kozinski in App. A at A-70-88. See also Masson v. New Yorker: But Don't Quote Me On That, 21 Pac.L.J. 1107, 1132-1136 (1990) (discussing Ninth Circuit's blurring of distinction between quotes and non-quoted paraphrases).

11). The Ninth Circuit's application of this holding to the facts demonstrates that it will produce wildly inconsistent results.

As the amici curiae briefs of the Journalists and Academics Concerned About Media Integrity and the Mountain States Legal Foundation explain fully, the Ninth Circuit's decision actually harms the First Amendment values it purports to protect. In striking contrast to almost any other media libel victory, the Ninth Circuit's holding threatens journalists as well as public figures. This Court must act to prevent further damage to reputations and to the First Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari and the briefs amici curiae, a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

CHARLES O. MORGAN, JR.
PAUL RICHARD KLEVEN
Counsel for Petitioner

MOTION FILED
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Respondents.

On Petition For A *Writ Of Certiorari* To The United States Court Of Appeals For The Ninth Circuit

MOTION AND BRIEF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

William Perry Pendley
Counsel of Record
Gary N. Herbert
Todd S. Welch
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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On Petition For A *Writ Of Certiorari* To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION

COMES NOW Mountain States Legal Foundation and respectfully petitions this Honorable Court for leave to

file the annexed brief *amicus curiae*.[1] In support of this motion, the Foundation states:

Mountain States Legal Foundation (MSLF) is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundation's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues.

The impact of the instant decision upon MSLF members is particularly disturbing. Business leaders, elected officials and candidates for public office, as well as private citizens, have all learned to be careful and precise in the use of their language when discussing controversial environmental issues which are volatile and evocative of media and public attention. MSLF is active on behalf of its members in crucial public discourse regarding issues of vital national importance – for example, the balancing

---

[1] Pursuant to Rule 42, Mountain States Legal Foundation requested consent from all parties for the filing of a brief *amicus curiae* in support of Petitioner. Only Petitioner provided written consent. The letter from counsel for Petitioner has been filed with this Honorable Court.

of economic and environmental objectives in timber harvesting in the Pacific Northwest. It is this type of informed discourse which will be chilled if the instant decision is permitted to stand. Permitting this decision to stand will cause all Americans, including those represented by MSLF, to suffer the loss of vital freedoms.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. Since the action is one in tort, the questions for Petitioner and Respondents are those of liability and damages.

However, the interests of *amicus curiae* Mountain States Legal Foundation are those of the longterm impacts of the decision below on public interest issues, including but not limited to, the ability of public figures involved in controversial issues to be "quoted" correctly by the media, the willingness of public figures involved in controversial issues to engage in free and open discourse regarding those important public policy issues, and the ability of the media to retain the trust and confidence of the American public when reporting on important public policy issues.

In sum, at stake is the survival of the proper balancing of the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern. In achieving that balance it is vital that consideration be given to the impact this decision will have on the free and open discussion of issues of public

concern. If Mountain States Legal Foundation is not permitted to file a brief *amicus curiae* these vital public policy issues will remain unaddressed.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
GARY N. HERBERT
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

July 1990

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On Petition For A *Writ Of Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of Mr. Jeffrey M. Masson, the Petitioner for *certiorari*.[1]

[1] *Amicus* has obtained the written consent of Petitioner. The written consent of Petitioner has been provided to the Clerk of the Court under separate cover. Respondents have declined to give consent. In accordance with Rule 37, a Motion For Leave To File Brief *Amicus Curiae* is provided herewith.

INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundation's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues.

The impact of the instant decision upon MSLF members is particularly disturbing. Business leaders, elected officials and candidates for public office, as well as private citizens, have all learned to be careful and precise in the use of their language when discussing controversial environmental issues which are volatile and evocative of media and public attention. MSLF is active on behalf of its members in crucial public discourse regarding issues of vital national importance – for example, the balancing of economic and environmental objectives in timber harvesting in the Pacific Northwest. It is this type of informed discourse which will be chilled if the instant decision is permitted to stand. Permitting this decision to stand will cause all Americans, including those represented by MSLF, to suffer the loss of vital freedoms.

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case. However, *amicus* supplements Petitioner's Statement of the Case with the following analysis of the decision by the Ninth Circuit Court of Appeals.

In its opinion, (App. A at A-10), the Ninth Circuit Court of Appeals summarized the "state of the current law governing the defamatory nature of statements ostensibly ascribed to another person by the use of quotation marks." According to that summary:

> – "A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination." *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976).
>
> *But*: "An author may . . . under certain circumstances, fictionalize quotations, 'to some extent.' " *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977).
>
> *However*: "An author's privilege to alter quotations is not unlimited." *Bindrim v. Mitchell*, 92 Cal.App. 3d 61, 70, 155 Cal.Rptr. 29, 34, *cert. denied*, 444 U.S. 984 (1979).

Based on the interpretation of the Ninth Circuit Court of Appeals of the "state of the current law," the Court held that fabricated quotations were permissible when:

– they are " 'rational interpretations' of ambiguous remarks made by the public figure . . . ," *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452 (3rd Cir. 1987), or

– they "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

REASONS FOR GRANTING THE *WRIT*

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Honorable Court.

This is one of the most important and far-reaching cases to come out of the Ninth Circuit Court of Appeals in years. It is not only deeply disturbing for any who are required to deal with the press on a frequent basis – whether public interest lawyer, attorney in the private practice of law, public official, or businessman or businesswoman dealing with the controversial issues of the day. It is also devastating for the media.

Already the subject of much public skepticism, the press can ill afford yet another blow to its credibility or motives. This decision, if left standing, would administer such a blow: the public would conclude that since the courts permit journalists to make up "quotations" to satisfy the needs of their story, then all "quotations" are manufactured.

It seems so fundamental and beyond debate that quotation marks bracketing a group of words mean that those words, and no others, are the words of the individual being quoted. But as Judge Kozinski points out in the very first paragraph of his dissent, (App. A at A-32), that

is exactly what this case is about. Do quotation marks mean that the words are those of the speaker?

Business leaders, politicians, and private citizens have all learned to be careful and precise in the words they use when discussing controversial issues. Over the last several years, business leaders and other public figures have schooled themselves on ensuring that their views are accurately conveyed to the public through the media. Business leaders and public figures have become so sensitized to the strong emotional baggage carried by some words and phrases, that they eschew such words in their communications with the media.

If this decision is allowed to stand, such caution and precision is useless. A member of the media will be able to fabricate "quotations" that he or she believes are "rational interpretations of ambiguous remarks" or that "do not alter the substantive content of unambiguous remarks actually made." Under these circumstances it would be foolhardy for public figures to speak to the media.

Equally chilling is the breadth of fabricated quotations permitted by the holding of the Ninth Circuit Court of Appeals in the event of a public figure's "self-appraisal." (App. A at A-18) Under the decision below, a reporter who believes he or she has discerned the "substance of [a public figure's] self-appraisal" may attribute to that public figure – in the words of Judge Kozinski – "any other statement reflecting that same trait." (App. A. at A-39) Thus, care in the use of one's language is in vain if one happens to convey sufficient information to constitute a "self-appraisal" permitting the reporter to attribute

to the public figure any quote consistent with that "self-appraisal." What public figure would be foolhardy enough to reveal any aspect of his or her character for fear that from that character assessment would spring a wealth of "quotes" that "reflect the substance of [that] self-appraisal?"

Not only business leaders and other public figures involved in controversial public policy issues will suffer if this decision stands. The media and, in the end, the American public and its greatly revered and protected freedom of the press will also be adversely affected.

Which will go first – the willingness of public figures to talk to the media, or the willingness of the public to believe the media? The answer is uncertain. Yet, in the end, both will disappear. The public will quickly learn that the media is free to make up "quotations" and the public will increasingly distrust the media. Coincidentally, public figures will not talk to the media for fear of being the victims of fabricated "quotations." It is hard to imagine what could have a greater "chilling" effect on free speech by a public figure than the fear of fabricated "quotations."

Thus, the goal sought by our Founding Fathers, free and open discourse on issues of public concern, will be thwarted.

In light of the exceptional importance of this matter, involving as it does the preservation of the intent of the First Amendment to the Constitution concerning the free and open public discourse of vital policy issues, it is critical that this Honorable Court grant *certiorari*.

B. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By This Honorable Court.

1. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Seek To Achieve A Balance Between Protecting The Rights Of An Individual To His Good Name And The Free Flow Of Opinions And Ideas.

This Honorable Court has long struggled "to define the proper accommodation between the law of defamation and the freedom of speech and press protected by the First Amendment." *Gertz v. Welch*, 418 U.S. 323, 325 (1974). That struggle reflects this Honorable Court's efforts to balance "the individual's right to the protection of his own good name," *Id.*, at 341, with "the free flow of opinions and ideas [which lie] at the heart of the First Amendment," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), and is "essential to the common quest for truth." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984).

This decision from the Ninth Circuit Court of Appeals, in one fell swoop, demolishes nearly two hundred years of that balancing and destroys not only the ability of an individual to protect his own good name, but also the very purpose of the First Amendment. It is difficult to envision a more pernicious decision, or a decision which does more harm at one time, then does the instant decision of the Ninth Circuit Court of Appeals.

This Honorable Court should grant *certiorari* in order to return the balancing of these two competing, but not mutually exclusive, goals.

2. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Assured To An Individual The Right To Protect His Good Name.

As was noted in *Rosenblatt v. Baer*, 383 U.S. 75 (1966):

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Id., at 92 (Mr. Justice Stewart concurring).

3. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Refused To Extend Constitutional Protection To A "Calculated," Or "Deliberate," Or "Reckless" Falsehood.

The decision of the Ninth Circuit Court of Appeals is directly contrary to the refusal of this Honorable Court to sanction a "calculated falsehood" that is, "the lie, knowingly and deliberately published." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). This Honorable Court has consistently refused to extend the protection of the First Amendment to those "unscrupulous and skillful enough to use the deliberate or reckless falsehood." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2696, n. 34 (1989).

As the dissent makes clear, (App. A at A-54 to A-55), the decisions of this Honorable Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971) provide no support for the exception which the Ninth Circuit Court of Appeals seeks to carve out and are, in fact, in direct conflict with the decision below. *Bose* and *Pape* stand for the proposition that malice may not be inferred from inaccurate language chosen to describe an event where the description is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " *Bose*, 466 U.S. at 512-13, quoting *Pape*, 401 U.S. at 290.

This Honorable Court, in *Bose*, sought to protect the essence of the First Amendment by recognizing the "descriptive challenges," *Bose*, 466 U.S. at 512, faced by the writer. However, no such "descriptive challenges" face a writer who, by the use of quotation marks, represents the words to be those of the speaker and not her own. On the other hand, this Honorable Court, in *Pape*, permitted a news magazine to publish out-of-context quotations. However, nowhere in that decision is the use of fraudulent quotations condoned.

This Honorable Court has never afforded First Amendment protection to the writer of a "calculated falsehood." Since the decision of the Ninth Circuit Court of Appeals provides First Amendment protection for just such a "calculated falsehood," that decision is in direct conflict with the decisions of this Honorable Court. The petition should be granted.

4. The Decision Below Is In Conflict With The Decision Of This Honorable Court Which Leaves To The Factfinder A Determination Of Whether Actual Malice Exists In A Particular Case.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Honorable Court held that it was for the trier of fact to determine whether the publication was made without actual malice. However, "professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination. . . . " *St. Amant*, 390 U.S. at 732.

Nonetheless, the Ninth Circuit Court of Appeals held that Respondents were cloaked in the protective embrace of the First Amendment and hence immune from a determination of liability by the factfinder. This holding of the Ninth Circuit of Appeals is in direct conflict with the decision of this Honorable Court. The petition should be granted.

5. The Decision Below Is In Conflict With The Decision Of This Honorable Court Setting Forth The Basis For Considering A Motion For Summary Judgment In A Libel Action.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Honorable Court held that, in considering a motion for summary judgment in a libel action, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255. Yet in the case below, as Judge Kozinski made abundantly clear in his dissent, (App. A at A-44 to A-45), the Ninth Circuit Court of Appeals simply failed to believe the Petitioner.

C. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below and Decisions Rendered By Other Courts Of Appeals.

1. The Decision Below Is In Conflict With The Decision Of Another Circuit Which Refused To Accord First Amendment Protection To Fabricated Quotations.

The Ninth Circuit Court of Appeals cites *Carson* for the proposition that a writer cannot "invent quotations and attribute them to actual persons." *Carson*, 529 F.2d at 213. Yet despite the court's recognition of the holding in *Carson*, and despite the analogous factual underpinnings of *Carson* with the instant case, the Ninth Circuit Court of Appeals chose to ignore not only its own general rule, but the rule from the Seventh Circuit which it cites as authority.

It is difficult, if not impossible, to ignore the holding of the Seventh Circuit in *Carson*, yet that is what the Ninth Circuit Court of Appeals has done. For in *Carson*, the Seventh Circuit denied First Amendment protection to fabricated quotations which the writer described as "a logical extension of what must have gone on," since, in the words of the Court, in the fabricating and imagining of such "facts" the author must have "entertained serious doubts" as to their truth and "a high degree of awareness of their probable falsity." *Carson*, 529 F.2d at 213.

In the instant case, the writer did not simply entertain serious doubt as to the truth or possess a high degree of awareness of the probable falsity of the "quotations" which she fabricated. She knew for a fact that they were false since she was there with Petitioner and had a tape

recording to verify whether or not he said the words which she attributed to him.

Instead of adhering to the rule of the Seventh Circuit, a rule which it endorsed, the Ninth Circuit Court of Appeals pursued an exception to the general rule. Yet there exists no such exception. The decisions of the Second and Third Circuit Courts of Appeals, which the Ninth Circuit Court of Appeals cites as its authority, certainly provide no basis for such an exception.

There is no exception whereby, in the words of the Ninth Circuit Court of Appeals – citing *Hotchner* – "[a]n author may . . . under certain circumstances, fictionalize quotations 'to some extent'." (App. A at A-10) *Hotchner* did not address the ability of a misquoted public figure to bring an action for defamation against the author who misquotes him. Instead, *Hotchner* involved an action by the person discussed in the quotation, and whether the defendant's republication of the original remark by Ernest Hemingway (albeit a kinder, gentler version of that remark) was libelous as it related to the individual discussed by Hemingway. *Hotchner* would only be in point if it addressed the ability of Hemingway's estate to bring a defamation action, in his name, for the publisher's revisions of Hemingway's original remark. *Hotchner* offers the Ninth Circuit Court of Appeals no authority for concluding that a reporter may fabricate "quotations" and attribute them to the alleged speaker of the words.

The Ninth Circuit Court of Appeals set forth two "circumstances" where fictionalized quotations are permissible, but neither case cited as authority stands for that general proposition.

The Ninth Circuit Court of Appeals held that *Dunn* stands for the proposition that an author may fabricate quotations if those quotations are "rational interpretations" of ambiguous remarks of a public figure. (App. A at A-10 to A-11) However, that is not the holding of *Dunn*. *Dunn* relates solely to whether the speaker of words, in English, could maintain a cause of action against a newspaper which attempted to translate those words into their Spanish equivalent.[2]

Even if *Dunn* is not simply a translation case, it is inapposite. Even if *Dunn* stands for the proposition that a writer may fabricate quotations in an attempt to summarize – as maintained by the Ninth Circuit Court of Appeals – those are not the facts in the instant case. Respondents here did not represent that they were summarizing the remarks of Petitioner, but indicated that the quotations were the very words from his mouth.

As to the second exception offered by the Ninth Circuit Court of Appeals, permitted when the fabricated quotations "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure," (App. A at A-11), the cases cited, including *Hotchner*, are not supportive. As noted above, *Hotchner* does not address the factual situation of the instant case.

The decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Seventh Circuit Court of Appeals. The petition should be granted.

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[2] That is, is it libelous to translate "litterbug" into the Spanish "cerdos" meaning "pig." (App. A at A-50)

2. The Decision Of The Ninth Circuit Court Of Appeals Is In Direct And Intolerable Conflict With The Decisions Of Other Circuits On Other Points Of Law.

As noted above, the decision of the Ninth Circuit Court of Appeals is in conflict with the decision of this Honorable Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The decision of the Ninth Circuit Court of Appeals is also in direct conflict with decisions of other circuits which have correctly applied the holding of *Anderson*, including *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987) and *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988).

The Ninth Circuit Court of Appeals improperly applied the clear and convincing evidence standard rather than the preponderance of the evidence standard, putting the Ninth Circuit Court of Appeals in conflict with the decision of *Goldwater v. Ginzburg*, 414 F.2d 329, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1099 (1970). The standard of proof question was left open by this Honorable Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2682 n. 2 (1989).

The Ninth Circuit Court of Appeals decision also puts it in direct and intolerable conflict with the District of Columbia Circuit since the latter circuit has repudiated the incremental harm doctrine. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) *rev'd on other grounds*, 477 U.S. 242 (1986).

D. A True, Direct, Intolerable and Irreconcilable Conflict Exists Between The Decision Below And Another Decision Rendered By Courts Of The State Of California.

Since the instant case involves an action in tort for defamation, the law of the State of California is the relevant law for determining whether there exists a cause of action.

The Ninth Circuit Court of Appeals cites *Bindrim* for the proposition that "reckless disregard for the truth [is] apparent from [the defendant's] knowledge of the truth of what transpired . . . [since] the defendant . . . was in a position to know the truth or falsity of her own material. . . . " *Bindrim*, 92 Cal.App. 3d, at 73.

Despite the analogous factual underpinnings of *Bindrim* to the instant case, the Ninth Circuit Court of Appeals chose to ignore the holding of *Bindrim*. What could be more directly in point than the following conclusion of the court in *Bindrim*: "since she attended sessions, there can be no suggestion that she did not know the true facts." *Bindrim*, 92 Cal.App. 3d at 73? (Quoted in App. A at A-6) To paraphrase, "Since [Ms. Malcolm] attended [interview] sessions [with Petitioner], there can be no suggestion that she did not know the true [statements made by him]." Thus the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the California court. The petition should be granted.

CONCLUSION

For the foregoing reasons, a *writ of certiorari* should issue to review the decision of the Ninth Circuit Court of Appeals. The insidious assault that this decision unwittingly permits against our most precious Constitutional freedoms – the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern – must be turned back.

Respectfully submitted,

William Perry Pendley
Counsel of Record
Gary N. Herbert
Todd S. Welch
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

July 1990

No. 89-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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Petitioner,

v.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC. and JANET MALCOLM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY IN SUPPORT OF PETITIONER JEFFREY M. MASSON

MICHAEL P. McDONALD
(Counsel of Record)
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W., Suite 600
Washington, D.C. 20037
(202) 663-9041
Attorney for Amicus Curiae Journalists and Academics Concerned About Media Integrity

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MOTION OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER JEFFREY M. MASSON

Journalists and Academics Concerned About Media Integrity, a voluntary, non-incorporated, association of individuals assembled exclusively for the purposes of the instant submission, hereby moves this Court, pursuant to Supreme Court Rule 37.2 for leave to file the annexed brief *amicus curiae* in support of Petitioner Jeffrey M. Masson. Counsel to *amicus curiae*, the Center for Individual Rights, has sought permission from the parties to this filing.* Counsel for Petitioner has consented to the filing of *amicus*'s brief; counsel for Respondents has refused.

---

* The Center for Individual Rights is a non-profit, public interest law firm which provides representation to deserving individuals and groups in cases raising significant legal policy issues. The Center is incorporated as a 501(c)(3) charitable organization under the Internal Revenue Code.

IDENTIFICATION OF *AMICUS CURIAE*

Journalists and Academics Concerned About Media Intergity comprises the following individuals:

Peter Collier is a free-lance writer and the co-author, along with David Horowitz, of several widely acclaimed books, including biographies on the Rockefeller, Kennedy, and Ford families.

John De Mott is a Professor of Journalism at Memphis State University. Before joining the Memphis State faculty, in 1980, he taught journalism at Temple University, Northern Illinois University, Northwestern University's Medill School of Journalism and the University of Kansas. Before becoming an educator, Dr. De Mott served 16 years as a news reporter and editor for the Kansas City Star and Times.

Joseph C. Goulden is director of media analysis for Accuracy in Media in Washington, D.C. He is the author of 16 non-fiction books. Prior to becoming a full-time writer, Mr. Goulden worked for newspapers for ten years, lastly as Washington bureau chief of *The Philadelphia Inquirer*. Mr. Goulden has received numerous newspaper and literary awards.

William E. Lee, Ph.D., is a professor at the Henry W. Grady College of Journalism and Mass Communication at the University of Georgia. Professor Lee has testified as an expert witness in many trials concerning journalistic practices and has written extensively on press freedom in journals such as *The Supreme Court Review*, the *Vanderbilt Law Review*, the *George Washington Law Review*, and the *Iowa Law Review*.

Clark Mollenhoff is a Professor of Journalism and Law at Washington and Lee University. A former Washington correspondent who has practiced journalism for over forty years, he is the recipient of numerous First Amendment awards for distinguished reporting including the John Peter Zenger award (U. Ariz., 1962), the William Allen White Memorial award (U. Kansas, 1964), and the National American Legion Fourth Estate award (1965). In 1958, Mr. Mollenhoff was awarded the Pulitzer Prize for national reporting.

Marvin Olasky, Ph.D., is an associate Professor of Journalism at the University of Texas, Austin. He has written several books about the media, including *Prodigal Press* and *Central Ideas in the Development of American Journalism*. Professor Olasky is currently a Bradley Resident Scholar at the Heritage Foundation in Washington, D.C.

R. Emmett Tyrrell, Jr. is the author of two books on contemporary politics, *The Liberal Crack-Up* and *Public Nuisances*. He is the editor-in-chief of *The American Spectator* magazine and a nationally syndicated columnist with King Features Syndicate.

Robert Poole is the publisher of *Reason* magazine, a monthly journal of news and political opinion. Prior to becoming the editor of *Reason*, Mr. Poole worked for twelve years as its editor-in-chief. He is a former syndicated newspaper columnist.

NATURE OF *AMICUS*'S INTEREST

Amicus consists of journalists and academics who are seriously concerned about media integrity in the wake of the Ninth Circuit's holding in this case. They believe that the decision below has far-reaching implications for journalists, public figures, and the public at-large across the country, not only in those states to which the Ninth Circuit's jurisdiction extends.

A constitutional right to manufacture defamatory quotations is not essential to operation of a free press. To the contrary, it threatens vital First Amendment values and erodes public confidence in the press. To the extent that *amicus*'s members practice the journalistic profession, the ruling below has a direct impact upon them and upon *their* credibility as writers.

As responsible writers and journalists, *amicus*'s members are further concerned that the Ninth Circuit's hold-

ing unnecessarily denigrates the individual's reputational interest, an interest which this Court has recently reaffirmed to be at the core of notions of human dignity, *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846, 4851 (June 21, 1990), citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (Stewart, J., concurring).

Permitting writers to escape potential legal liability for deliberately altered quotations which injure a person's reputation is to countenance "the use of the known lie as a tool," a result which this Court has repeatedly declared to be "at odds with . . . the orderly manner in which economic, social, or political change is effected." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1965).

As experienced journalists and distinguished academics who are familiar with this Court's First Amendment jurisprudence, *amicus*'s members strongly support the right of free speech. However, they also believe reputational interests are worthy of legal protection. Theirs is a balanced perspective which is oftentimes lacking in briefs filed with this Court by news organizations or other media groups. Consequently, they believe that the filing of this brief will bring relevant legal and factual matter to the attention of this Court that will not otherwise be taken into consideration.

For the foregoing reasons, Journalists and Academics Concerned About Media Integrity respectfully requests that this Court grant its motion for leave to participate as *amicus curiae*.

Respectfully submitted,

MICHAEL P. MCDONALD
(Counsel of Record)
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W., Suite 600
Washington, D.C. 20037
(202) 663-9041
Attorney for Amicus Curiae Journalists and Academics Concerned About Media Integrity

July 18, 1990

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BRIEF *AMICUS CURIAE* OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY IN SUPPORT OF PETITIONER JEFFREY M. MASSON

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* are set forth in the foregoing Motion for Leave to File a Brief *Amicus Curiae*.

STATEMENT OF THE CASE

Amicus adopts the statement of the case provided by Petitioner Jeffrey M. Masson in his petition for certiorari.

SUMMARY OF ARGUMENT

This case presents the important question of whether the First Amendment protects journalists who libel public figures through the intentional use of fictionalized quotations. Beyond its importance to the press and to public figures whose reputations may be injured in this fashion, this question is of vital concern to the public. As Judge Kozinski recognized, extending First Amendment protection to journalists who deliberately distort what someone else has said deceives readers about the author's editorial role and thereby corrupts the marketplace of ideas. If the First Amendment may be so expansively interpreted, as it was below, to allow an author to alter another person's remarks with virtual immunity from suit, it will afford journalists not only the opportunity to assail the reputations of public figures with impunity, but also the opportunity to deceive the reading public.

The Ninth Circuit has promulgated the novel constitutional rule that an intentionally false and defamatory statement which is published in the form of a fictionalized quotation is not actionable if it is merely a "rational interpretation," or does not "alter the substantive content," of remarks actually made by a public figure. In so holding, the court of appeals expressly found it to be irrelevant that the Petitioner might be able to convince a jury on the basis of testimonial and documentary evidence that the fictionalized quotations were published with actual malice. By granting writers an absolute immunity to print knowing or reckless lies, the lower court's ruling stands in direct and open conflict with past libel rulings of this Court admitting of no exception to the requirement that *all* defamatory falsehoods made with actual malice are actionable.

Reasonable people can and do differ over the appropriate level of First Amendment protection that courts should extend to writers who publish false statements "in

order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). But no one can seriously dispute that the Ninth Circuit's ruling, which extends virtually absolute First Amendment protection to deliberately manufactured quotations, is an important question deserving of review.

ARGUMENT

I. THE HOLDING BELOW DISSERVES IMPORTANT FIRST AMENDMENT VALUES.

The Ninth Circuit's ruling unjustly devalues the legitimate reputational interests of Petitioner and similarly situated public figures. *See infra* at 12-13. By permitting false statements to be published with impunity, the ruling also disserves important First Amendment values retained by the public and by individuals to whom false quotations are attributed. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776-777 (1984) ("False statements of fact harm both the subject of the falsehood *and* the readers of the statements") (emphasis in original).

A. The Ninth Circuit's Ruling Reduces The First Amendment Interests Of The Reading Public And Corrupts The Marketplace Of Ideas.

The public has an interest in receiving a broad range of unadulterated ideas. Free expression has been valued as "not only an aspect of individual liberty—and thus a good unto itself—but also [as] . . . essential to the common quest for truth and the vitality of society as a whole." *Bose v. Consumers Union of United States*, 466 U.S. 485, 503-4 (1984).

The goals of truth and enlightenment are best achieved when ideas are freely traded in the "competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). However, the Ninth Circuit's holding corrupts the marketplace of ideas and

diminishes the public's First Amendment interest in robust debate in two ways. First, it confers vast immunity on writers to circulate false statements of fact. Such falsehoods, which this Court has described as valueless, "interfere with the truthseeking function of the marketplace of ideas." *Falwell v. Flynt*, 108 S.Ct. 876, 880 (1988). *See also, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 733 (1985) (". . . it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communications with the most misinformation and do the most damage to private reputation.") (White, J., concurring).

Second, the ruling allows writers to exercise "an unjustified monoply" in the marketplace of ideas. App. A at A-48 (Kozinski, J., dissenting). Under the lower court's rule, a writer purporting to quote a public figure, is virtually free to control the speaker's expression of his ideas and the public perception of how those ideas are received so long as the fictionalized quotations employed are "rational interpretations" of what the speaker has actually said. The First Amendment commands no such result.[1]

Justice Brennan has recently noted that when a writer uses conjectural or cautionary language he intends to alert readers that the statements he publishes are not to be taken as fact.

[1] Experience teaches that the truth rarely catches up to a lie. Although never entirely adequate, the law of defamation exists in order to remedy this situation by providing vindication and redress when a person's reputation is injured because of lies. As noted below, the principal reason the First Amendment limits the full operation of state libel laws is so that the press may avoid the stifling effect of massive liability. *Infra* at 10. A secondary reason is to protect journalists from simple, "good faith" errors of fact. *New York Times v. Sullivan*, 367 U.S. 254, 279 (1964). Neither of these two important First Amendment interests is served by extending protection to false, intentionally altered quotations.

> Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's best guess.

Milkovich v. Lorain Journal Co., 58 U.S.L.W. 4846, 4853, fn. 5 (June 21, 1990) (Brennan, J., dissenting).

In much the same way, a writer's use of quotation marks unequivocally alerts readers to expect factual statements or opinions actually uttered by the quoted speaker. No reasonable reader can fail to believe that he is being presented with a person's exact statements when he encounters these punctuation signs.[2] The Ninth Circuit's ruling turns this common sense expectation on its head. It permits, and indeed encourages, a writer to work significant alterations in a speaker's language. However, the public has an interest in having a person's statements and ideas expressed accurately and in the original words.

At the same time, the underlying rationale for insulating the press from liability loses its force in a context such as the instant one, where Respondents have distorted and fabricated another person's speech. Communicators have been afforded special constitutional protections in the libel arena precisely because of the instrumental role they play in creating and maintaining the "marketplace" of ideas.

When members of the press substitute their own voices for those of the individuals they are purportedly quoting,

[2] Most people speak less carefully than they write. For this reason, journalists occasionally "alter" an interviewed person's remarks in order to remove hesitations, stammerings, or syntactical lapses that would make the speaker appear less than intelligent. Thus the public may not always receive a speaker's unadorned statements. However, "cleaning up" quotations is an accepted journalistic convention as long as the quotations altered in this fashion remain faithful to the meaning intended by the speaker.

they are no longer serving their intended role of facilitating the widest possible dissemination of information from diverse sources. Instead of contributing to robust debate they are polluting the marketplace of ideas. Such practices do not serve the purpose of the First Amendment "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 388, 390 (1969).

When exposed or given judicial sanction—as each occurred here—the deceptive practice of fictionalizing quotations also lessens public confidence in the press. This is of particular concern to *amicus* made up, as it is, of writers and journalists. When the members of the press intentionally distort an individual's quotation, they betray the public confidence in the press and impede public debate. The Ninth Circuit's holding is thus inimical to this Court's reliance on the press as a reliable conduit of ideas.

B. The Ruling Below Improperly Diminishes The First Amendment Interests Of Speakers To Employ Words Of Their Own Choice.

One premise of the First Amendment is that freedom of expression facilitates individual self-fulfillment. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting); "Thought and communication are the fountainhead of all expression of the individual personality." T. Emerson, A System of Freedom of Expression, 9 (New York, Random House 1970).

A speaker's choice of words is a manifestation of his personality. When a quotation is altered in substantive content, or entirely fabricated, a writer strips the expression of the speaker's distinctiveness and replaces it with his own. Permitting a writer to alter another person's quotations thereby diminishes the speaker's reputational interest in presenting an image of himself to the public that *he* believes to be proper.

To be sure, "selecting the words used to describe a particular event is not always a precise science. . . ." For this reason, "[t]he first amendment fully protects [an author's] prerogative" to report on ambiguous events as he or she wishes. App. A at A-56. (Kozinski, J., dissenting.) However, this is quite a different matter from engaging in "personality alteration" through quotation fictionalization.

A speaker imparts his individuality though the words he chooses. By using of quotation marks, a writer purports to convey the words and personality of another speaker. To tamper with a quotation is thus to invade and harm not only a person's reputational interests but his interest in the self-expression of his thoughts:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.

FCC v. Pacifica Foundation, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

In summary, the Ninth Circuit's impairment of the First Amendment interests of speakers is improper. The Court should grant review to examine and correct the flawed analysis from which it stems.

II. THE BROAD, UNBOUNDED HOLDING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS AN IMPORTANT ISSUE OF LIBEL LAW WARRANTING THE COURT'S REVIEW.

The Ninth Circuit's opinion represents an unsound application of this court's libel jurisprudence to the facts of Petitioner's case. The opinion below holds that a writer may deliberately fabricate quotations and place those quotations in the mouth of a public figure as long as the

fabricated quotations are "rational interpretations" of "ambiguous" remarks actually uttered by the public figure or do not alter the "substantive content" of unambiguous statements that the public figure has made. App. A at A-10-11.

In arriving at this holding, the Ninth Circuit claimed to rely upon guidelines supplied by this Court in determining when actual malice may be inferred from evidence showing misleading editing. The appeals court also sought guidance from other federal and state appellate courts which have previously had to face the problem of defamatory misquotations. However, the result reached, and the theory developed to support that result, so far exceed the tolerable boundaries that this or any other court has been willing to extend to false speech that it may be properly viewed as unprecedented.

In recent years, the issue of deliberate quote alteration and falsification has been an integral feature of several notable libel suits.[3] *See e.g., Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1175 (S.D.N.Y. 1984) (involving editing and distortion of various interviewees' remarks to support conspiracy theory); *Selleck v. Globe Intern., Inc.*, 212 Cal. Rprt. 838, 844 (Cal. App. 2 Dist. 1985) (falsely ascribing statements to father of Hollywood celebrity); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 450-452 (3d Cir. 1987) (fabricated quotations attributed to mayor through inadequate language translation). Concurrently, a watershed in modern journalism has occurred through the rise and influence of writers who practice what has come to be known as "the

[3] At common law, an inaccurate quotation constituted libel of the person purportedly being quoted if the quotation was false and the attribution of it to the person placed him in disgrace. *See e.g., Spence v. Funk*, 396 A.2d 967, 970 (Del.Supr. 1978) citing *Rice v. Simmon*, Del.Ct. of Err. and Apps., 2 Harr. 417, 429 (1836); R. Sack, Libel, Slander, and Related Problems (New York, Practising Law Institute 1980) at II.4.9, "Inaccurate Quotation," and cases cited therein.

New Journalism."[4] A decision by this Court on the precise standards to be applied will resolve differences among courts, provide clear guidance to the press and thereby lead to greater predictability in judicial administration of the law of libel.

Conversely, failure to grant review of the Ninth Circuit's ruling will perpetuate existing divisions on an issue of manifest importance to libel plaintiffs and defendants and impair the effective operation of the libel scheme established by this Court.

A. The Ninth Circuit's Holding Undermines The Appropriate Constitutional Balance Developed By This Court In *New York Times v. Sullivan* And Its Progeny Between The Need For Vigorous Public Discourse And The Need To Redress Injury To Citizens Wrought By Deliberately False Speech.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court undertook an important step in placing limits upon the application of state libel law. Under the federal constitutional rule announced in the case, a writer sued for libel by a public official could no longer be held liable for merely publishing a defamatory falsehood which caused injury to the plaintiff's reputation. Concerned that State rules of this kind would deter protected speech on maters of public concern, the Court held that liability in such circumstances could only be premised upon a finding of "actual malice," defined in constitutional terms as publishing knowing falsehoods or in reck-

[4] Whereas traditional journalism is characterized by a preoccupation with facts and events, the object of the "new journalism" is to interpret public affairs through a particular point of view. It therefore eschews the traditional journalistic role of being a neutral finder and conveyor of information. *See generally*, Weaver, "The New Journalism And The Old," *The Public Interest* 67 (Spring 1974).

less disregard of the truth of the challenged libels. *Sullivan*, 376 U.S. at 280.

The Court recognized in *Sullivan* that by increasing the legal protection afforded freedom of speech, it was necessarily diminishing that vouchsafed individual reputation. *Sullivan*, 376 U.S. at 272 ("Whatever is added to the field of libel is taken from the field of free debate.") (quoting *Sweeney v. Patterson*, 76 U.S. App. D.C. 23, 24, 128 F. 2d 457, *cert. denied* 317 U.S. 678 (1942)). However, because of the central position that free speech occupies in maintaining an enlightened electorate and because of a genuine concern that outsized money awards in libel suits would stifle public debate, the Court concluded that the States' power to protect individual reputation had to be limited.

The purpose of the actual malice requirement was not to protect harmful falsity from punishment (assuming the constitutional liability standard is met), but to protect the press from intimidation or annihilation by huge damage awards. Accordingly, the Court expressly declined to adopt the view of certain of its members who urged that the press be afforded an absolute immunity to defame public officials. Instead, Justice Brennan's majority opinion struck an appropriate balance between the need for writers to be able to discuss matters of public concern in an uninhibited manner and the competing need of defamed public officials to protect their reputations from unjustified harm.

A substantial expansion, modification, and refinement of the libel scheme outlined in *Sullivan* has occurred over the past twenty-five years. However, one bedrock principal has remained constant: defamatory falsehoods made with actual malice are always actionable.

Early in the development of the actual malice rule, Justice Brennan, speaking for the Court in *Garrison v.*

Louisiana, 379 U.S. 64 (1965), explained the substantial policy reasons for limiting speech in this fashion:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public figure, should enjoy a like immunity. . . . Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence, the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. at 75.

Thus, when this Court enlarged the constitutional protections afforded writers to comment upon the activities of "public figures," and, briefly, "issues of general or public concern," it steadfastly refused to retreat from the position that calculated falsehoods would remain actionable. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *Cf., Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (despite existence of weighty federal policies favoring uninhibited debate in the context of labor disputes, neither union nor management may intentionally circulate defamatory falsehoods).

Similarly, the Court's landmark decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) re-emphasized the rule that calculated or reckless lies must remain actionable. Such statements, being false, not only have "no constitutional value," but also actively undermine the premises of democratic government. 418 U.S. at 340.[5]

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[5] Moreover, Justice Powell's opinion for the Court in *Gertz* cited access to the media as one of the principal rationales for holding public figures to the onerous actual malice standard:

See also McDonald v. Smith, 472 U.S. 479 (1985) (constitutional right to petition the government for redress of grievances does not allow one to libel public officials with impunity).

The Court's adherence to the "actual malice" rule has continued undiminished to the present day. See, *e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S.Ct. 2678, 2698 (1989) (press retains only a qualified immunity to comment upon the activities of public figures). Thus, while this Court's decisions extending First Amendment protection to writers clearly demonstrate the need for free and unhibited discussion of public debate

> . . . there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

Milkovich v. Lorain Journal Co., 58 U.S.L.W. at 4851.

It is precisely this bedrock rule that the Ninth Circuit has seen fit to ignore. In place of the scrupulous balance which this Court has rigorously maintained between the competing values of free speech and the individual's right

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The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individual's normally enjoy.

Gertz, 418 U.S. at 344. However, if courts now afford the press wide latitude to distort what public figures say, it may likely prove an exercise in futility for them to seek to correct damaging falsehoods by means of "self-help."

to the protection of his reputation—a balance which has always enabled public figures to sue over calculated lies —the Ninth Circuit has conjured up two new constitutional rules by which it would allow writers to publish defamatory falsehoods about public figures *with actual malice* and yet escape liability for any harm inflict. The two escape mechanisms devised by the appeals court are (1) its so-called "rational interpretation" rule and (2) its "substantive content" rule.

Both rules bar a public figure libel plaintiff from maintaining a cause of action whenever a writer attributes fictionalized quotations to him that are reasonably related to something he did not say, but might have, or to something he did in fact say, but in an ambiguous manner. This is so even if, as here, it is "uncontroverted" that the quotations at issue were fictionalized and if it is assumed that they were made with actual malice.

However, this Court has previously employed the actual malice rule to hold journalists accountable for fabricated facts and statements misattributed to other individuals. For example, in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court affirmed a jury finding that a newspaper reporter had published knowing and reckless falsehoods about a Kentucky family, the Cantrells, the father of which had been killed in a bridge collapse. In reaching this result, the Court noted that the reporter has fabricated parts of his story in order to imply to readers that he has seen and spoken with Mrs. Cantrell, when in fact he had not. *Id.* at 253. Although the *Cantrell* case involved an action for false light invasion of privacy, the holding is equally applicable to the facts of Petitioner's libel case.[6]

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[6] The major elements of a false light cause of action are similar to defamation. The statement must be made public, it must be of or concerning the plaintiff, it must be unprivileged, and it must be false. While a false light tort is distinguished from libel by the additional requirement of "offensiveness" to a person of ordinary sen-

The Ninth Circuit's ruling stands as an open challenge to previous rulings by this Court. Review is thus warranted in order to correct a holding which clearly undermines the Court's libel jurisprudence

B. The Rationale Underlying The Court Of Appeals' Holding, Which Extends First Amendment Protection To Writers Who Intentionally Fabricate Quotations, Is Unsound.

The Court of Appeals found it to be "uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson." App. A at A-31. It further assumed, as it was compelled to do by the applicable standards governing appellate review of summary judgment dismissals, that respondents had "deliberately altered" the disputed quotations. App. A at A-5. It nonetheless held that the false and defamatory words which respondents attributed to Masson were not actionable.

In reaching this conclusion, the appeals court reasoned that although "a factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is *wholly* the product of the author's imagination," the First Amendment nevertheless fully protects writers who intentionally decide to fictionalize another person's remarks "under certain circumstances." App. A at A-10 (emphasis added; citations omitted). As noted, the lower court broadly defined the circumstances under which writers would be afforded immunity from liability for fictitious quotations as occurring whenever a writer demonstrates that the fabricated quotations:

> . . . are either "rational interpretations" of ambiguous remarks made by the public figure, . . . or do

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sibilities, this element has not proven to be of constitutional import in this Court's treatment of the tort and its impact upon free speech. *See e.g., Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying *Sullivan* actual malice standard to false light privacy action dealing with publication about a legitimate matter of public concern.)

> not "alter the substantive content" of unambiguous remarks actually made by the public figure. . . .

App. A at A-11.

The lower court offers no convincing rationale to justify its holding. It casually redefines the well established meaning of what quotation marks signify—ruling, as the dissent below noted, that allegedly direct quotations are henceforth entitled to be considered "merely an extrapolation of the speakers words character"—without once pausing to reflect upon the far-reaching consequences of its action. App. A at A-33.

Had the court done so, it might have noted the inescapable ambiguities inherent in the test it employed to "define" non-actionable quote fictionalization from actionable quote fictionalization. The court provides no clear guidelines for distinguishing between the two and none is possible since the test turns upon such inherently subjective evaluations as what statements may constitute a "rational interpretation" of, or be "substantively similar" to, remarks that another person has made. *Cf., Falwell v. Flynt*, 108 S.Ct. 876, 881-882 (1988) (lack of ability to lay dow a "principled standard," due to "inherent subjectiveness" of standard, renders proposed test for statements inflicting intentional distress defective).

Consider the lower court's application of its test to one of the many fabricated quotations that form the basis of Petitioner's case: Malcolm's fabricated quotation of Masson's alleged boast that he would have turned the Freud house into "a place of sex, women [and] fun." The phrase is entirely Malcolm's; it is nowhere to be found on the tape recordings she made in her interviews of Masson. However, the lower court found that because Masson had spoken of giving parties at the Freud house on one occasion and had discussed the promiscuous lifestyle he had led in his youth on another, Malcolm was entitled to make "rational interpretations" of these state-

ments in order to produce the "sex, women [and] fun" quotation.

It hardly needs stating how the rationale employed below could be used to sanction malicious character assassination so long as a writer is capable of arguing with a straight face that the defamatory quotations he has falsely placed in the mouth of his victim "flow from" actual remarks the victim has made at some point in his life.

The justification proffered by the appeals court, such as it is, was properly characterized by Judge Kozinski as "explosive":

> What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.

App. A at A-39. A more appropriate test for distinguishing actionable from non-actionable quotes would be the five-part test suggested by the dissent below.[7] This Court should therefore grant the petition in order to clarify what the appropriate test should be.

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[7] The five-step test which Judge Kozinski proposes be used in fictitious quotation cases asks:

> (1) Does the quoted material purport to be a verbatim repetition of what the speaker said? (2) If so, is it inaccurate? (3) If so, is the inaccuracy material? (4) If so, is the inaccuracy defamatory? (5) If so, is the inaccuracy a result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth? If the answer to any of these questions is no as a matter of law, the inquiry stops and the defendants win. If they could all be answered yes, . . . the matter [is sent] to the jury.

App. A at A-69-70. In place of the dissent's inquiry, which is clear, logical and easily applied by trial judges, the majority below offers its "rational interpretation" examination, a test so arbitrary and subjective in nature that it invites confusion.

CONCLUSION

The First Amendment to the Constitution does not protect writers who deliberately fictionalize quotations. The right to doctor quotations is not essential to the operation of a free press. A writer's use of fictitious quotations may, as in the present case, cause serious reputational harm. Moreover, fictitious quotations deceive the reading public, lessen press credibility, and distort the collective search for truth.

For these and for all the reasons set forth above, *amicus* urges that petition for a writ of certiorari be granted.

Respectfully submitted,

MICHAEL P. MCDONALD
(Counsel of Record)
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W., Suite 600
Washington, D.C. 20037
(202) 663-9041
Attorney for Amicus Curiae Journalists and Academics Concerned About Media Integrity

July 18, 1990

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JOSEPH F. SPANIOL, JR.
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No. 89-1799

In The

Supreme Court of the United States

October Term, 1989

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

CHARLES O. MORGAN, JR.*
PAUL RICHARD KLEVEN
LAW OFFICES OF
CHARLES O. MORGAN, JR.
450 Sansome Street
Suite 1310
San Francisco, CA
94111-3382
Telephone: (415) 392-2037
Counsel for Petitioner

H. BARTOW FARR, III*
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 "M" Street, N.W.
Suite 350
Washington, D.C. 20037
Telephone: (202) 775-0184
Counsel for Respondents

(Additional Counsel listed on inside cover).

*Counsel of Record

PETITION FOR CERTIORARI FILED MAY 16, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Charles W. Kenady
Karl Olson
Cooper, White & Cooper
101 California Street
Suite 1600
San Francisco, CA 94111
Telephone: (415) 433-1900
Counsel for Respondents

Of Counsel: Joseph H. Cooper
The New Yorker
25 West 43rd Street
New York, N.Y. 10036

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Nov 29	1	COMPLAINT: SUMMONS ISSUED.
1985		
Feb 1	9	Plaintiff's IST AMENDED COMPLAINT, No Process.
Feb 11	11	–Notice of Motion to Dismiss Ist Amended Complaint or for more definite statement.
	12	–Memo in support of motion to dismiss Ist amended Complaint.
Mar 1	15	Plaintiff's Memo of Points & Authorities in opposition to motion to dismiss Ist amended complaint/or for more definite statement. 3-15-85 at 10 a.m.
Mar 8	17	Defendant's reply Memo in support of motion to dismiss or for more definite statement.
Mar 22	18	MINUTES: (C/R Lavon Granger) defendant's Motion to dismiss Ist amended Complaint or for more definite statement, Granted with 30 days leave to amend.
Apr 22	20	Plaintiff's *2nd AMENDED COMPLAINT,* Jury Demand. No Process.
May 2	21	Defendant's Memo in support of Motion to dismiss 2nd amended complaint 6-7-85 at 10 a.m.
May 2	22	–Notice of Motion to dismiss 2nd amended complaint 6-7-85 10 a.m.

May 24	23	Plaintiff's Memo of Points & Authorities in opposition to motion to dismiss 2nd amended complaint or for more definite statement.
May 28	24	–Memo of Points & Authorities in opposition to motion to dismiss 2nd amended complaint or for more definite statement. 6-7-85 at 10 a.m.
May 31	25	Defendants' Reply Memo in Support of Motion to dismiss Second Amended Complaint
Jun 3	26	–Reply Memo in support of #22.
Jun 7	27	ORDER RE DEFAMATORY ALLEGATION (d): EFL
	28	MINUTES: (c/R Ray Linkerman) Defendant's Motion to dismiss 2nd amended complaint. Order: Plaintiff may amend complaint within 30 days following service of court's order re summary judgment motion.
Jun 12	30	ORDER: Defendant's Motion to dismiss 2nd amended complaint, denied. EFL
Jul 12	35	Plaintiff's *3RD AMENDED COMPLAINT*, Jury Trial Demanded.
Aug 5	36	Defendants Janet Malcolm, The New Yorker Magazine, Inc. and Alfred A. Knope, Inc.'s *ANSWER TO 3rd AMENDED COMPLAINT*. Jury Trial demand.
1986		
May 1	58	Defendant's motion for summary judgment 5-30-86 at 10 a.m.
	59	–Declaration of Janet Malcolm re #58 entry.

May 14	61	Defendant's memo of points & authorities in support of motion for summary judgment 5-30-86 at 10 a.m.
May 23	62	Plaintiff's motion for leave to amend complainti [sic] 6-21-86 at 10 a.m.
	63	–Memo of points & authorities in support of #62 entry.
Jun 6	65	Plaintiff's declaration of Jeffrey Masson in opposition to motion for summary judgment, with exhibits.
Jun 6	66	Defendant's opposition to motion for leave to file fourth amended complaint.
Jun 6	67	–Declaration of Charles W. Kenady re #66 entry.
Jun 6	68	– –of Karl Olson re #66 entry.
Jun 6	69	Plaintiff's memo of points & authorities in opposition to motion for summary judgment.
Jun 13	71	Plaintiff's reply memo in support of motion to amend complaint. 6-20-86 10 a.m.
	72	Defendant's reply brief in suport [sic] of motion for summary judgment.
Jun 20	73	MINUTES: (C/R Ray Linkerman) Defendant's motion for summary judgment submitted. Plaintiff's motion for leave to amend complaint granted. Status conference not held. Order: Defendants may have 30 days to responde [sic] to amended complaint. EFL
Jul 18	75	Plaintiff's *4th AMENDED COMPLAINT* & jury trial demand.

Aug 18	76	PARTIAL SUMMARY JUDGMENT, for defendants on issue of false passages referred in paragraphs of Masson's complaint. Entered 8-21-86 Copies to counsel of record. EFL
Aug 29	77	Plaintiff's notice of motion & motion for reconsideration of the partial summary judgment order. 10-24-86 at 10 a.m.
	78	–Memo of points & atuhorities [sic] in support of motion for reconsideration. 10-24-86 at 10 a.m.
Oct 2	79	Defendants Janet Malcolm, The New Yorker magazine, Inc., and Alfred A. Knopf, Inc.'s ANSWER TO 4th AMENDED COMPLAINT. Jury trial demand.
Oct 10	80	–Opposition to motion for reconsideration of partial summary judgment order.
Oct 24	81	MINUTES: (C/R Robin Ramon) Plaintiff's motion for reconsideration of partial summary judgment, ordered denied.
Oct 24	82	ORDER: Plaintiff's motion for reconsideration denied. EFL
1987		
Mar 27	92	Defendant's notice of motion & motion for summary judgment 5-22-87 at 10 a.m.
Mar 27	93	–Memo of points & authorities re #92 entry.
Mar 27	94	–Statement of material facts not in dispute.

Mar 27	95	–Declaration of Janet Malcolm re #92 entry.
Mar 27	96	– – – Charles W. Kenady re #92 entry.
Apr 24	98	Plaintiff's response to statement material facts not in disputed [sic].
Apr 24	99	–Memo of points & authorities in opposition to motion for summary judgment.
Apr 24	100	–Declaration of Jeffrey M. Masson.
Apr 24	101	– – – Charles O. Morgan Jr.
May 15	102	Defendant's objections to inadmissible evidence cited in support of motion for summary judgment.
May 15	103	Defendant's supplemental declaration of Jane [sic] Malcolm in support of motion for summary judgment.
May 15	104	Defendant's reply brief in support of mtoion [sic] for summary judgment.
Jun 5	108	Plaintiff's analysis of certain challenged quotations
	109	Defendant's appendix in support of summary judgment motion.
Jul 9	110	Letter to courts 6-8-87 from Carles [sic] O. Morgan Jr. re In receipt of Defendants appendix in support of motion for summary judgment & wish to lodge following objections
Jul 9	111	Letter to courts 6-11-87 from Cooper, White & Cooper re writing in response to plaintiff's counsel's 6-8-letter objecting to filed appendix.

Jul 9	112	Letter to courts 6-5-87 from Cooper, White 7 [sic] Cooper re find defendants appendis [sic] in support of motion for summary judgment.
Jul 9	113	Letter to courts 7-2-87 from Charles O. Morgan Jr. re defendants engaged in misleading statements.
Aug 17	114	ORDER GRANTING SUMMARY JUDGMENT. Entered 8-17-87 Copies to counsel. EFL
Aug 17	115	JUDGMENT: For the defendants, each to bear own fees and costs. Entered 8-17-87, Copies to counsel of record. EFL
Sep 11	116	Plaintiff appellants *NOTICE OF APPEAL* Fee Paid. Copy of docket sheets and notice to counsel of record. Notice to USCA. *87 2665*
Sep 22	117	Defendants' CROSS APPEAL, Fee paid. Notice to counsel & to USCA with copies of the docket sheet 87 2700

Docket Entries – Ninth Circuit Court of Appeals
Appeal Nos. 87-2665, 87-2700

December 4, 1987	Brief for Appellant; Excerpts of Clerk's Record
January 24, 1988	Appellees' and Cross-Appellants' Brief; Supplemental Excerpt of Record
January 28, 1988	Reply Brief for Appellant's Brief for Cross-Appellee
June 16, 1988	Oral Argument and Submission
August 4, 1989	Opinion
August 19, 1989	Appellant's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc
February 15, 1990	Order Amending Opinion and Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc

MICHAEL BROOKS CARROLL
ERIC J. FIRSTMAN
CARROLL & HAINES
601 Montgomery Street, Suite 2000
San Francisco, California 94111
Telephone: (415) 788-7600

Attorneys for Plaintiff
JEFFREY M. MASSON

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, vs. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	)	NO. C 84-7548 EFL FOURTH AMENDED COMPLAINT FOR DEFAMATION AND INVASION OF PRIVACY [JURY TRIAL DEMANDED]

Plaintiff complains and alleges as follows:

JURISDICTION

1. Plaintiff JEFFREY M. MASSON ("MASSON") is a citizen of the State of California who resides in this judicial district.

2. Defendant THE NEW YORKER MAGAZINE, INC. ("THE NEW YORKER") is a New York corporation with its principal place of business at New York, New York.

3. Defendant ALFRED A. KNOPF, INC. ("KNOPF") is a New York corporation with its principal place of business at New York, New York.

4. Defendant JANET MALCOLM is a citizen and resident of the state of New York.

5. This Court has jurisdiction over the subject matter of this action in that the Plaintiff and Defendants are of diverse citizenship and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

6. Venue is proper in this Court because Plaintiff resides in this judicial district and the claim which forms the subject-matter of this action arose in this judicial district.

FIRST CAUSE OF ACTION

(Against Defendant MALCOLM for Defamation.)

7. Plaintiff JEFFREY MASSON is a Sanskrit scholar and psychoanalyst who formerly served as Projects Director of the Sigmund Freud Archives. Over the course of several years, beginning around 1972 and continuing until around 1982, MASSON became the associate and confidante of persons prominent in the international psychoanalytic community, among them Dr. Anna Freud, Sigmund Freud's daughter, and Dr. Kurt Eissler, Secretary of the Sigmund Freud Archives. MASSON's association with these and other persons and his subsequent appointment as Projects Director of the Freud Archives gave him access to previously unpublished documents

pertaining to the history of psychoanalysis, including much of Sigmund Freud's personal correspondence.

8. Over the course of many years and particularly after he gained access to Freud's personal correspondence in his capacity as Projects Director of the Freud Archives, MASSON developed an original and (to members of the psychoanalytic "establishment") highly unorthodox theory concerning the origins of psychoanalytic thought. In particular, MASSON's research focused on the historical prominence of the so-called "seduction theory".

9. MASSON's research gradually revealed that Freud did not abruptly abandon the "seduction theory" in the Autumn of 1897 as previous scholarship had indicated. MASSON uncovered clear and previously undisclosed evidence of Freud's ongoing interest and belief in the "seducation [sic] theory", which holds that neurotic personality disorders originate in actual sexual abuse during childhood. MASSON's research further revealed that Freud turned his back of the seduction theory in favor of a theory more pleasing to his colleagues' sensibilities. Freud's subsequent theory held that neuroses originate in unconscious fantasies and not in actual sexual abuse at the hands of a parent or other authority figure.

10. MASSON's scholarly research led him to conclude that Freud abandoned the "seduction theory" not as a result of clinical observations, but to further his career and to placate his colleagues.

11. MASSON published his views in 1984 in a book entitled THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY.

12. On information and belief, MASSON's views were so unorthodox that they were perceived as a threat to the psychoanalytic "establishment." MASSON is informed and believes that, for this reason, members of this establishment and persons with connections thereto had a vested interest in discrediting MASSON and his views.

13. Thus, when Defendant MALCOLM, a writer with close ties to the psychoanalytic "establishment," wrote an article concerning MASSON for THE NEW YORKER which is the subject matter of this complaint, she focused it not primarily on MASSONS's scholarship or the research behind his work, but instead primarily on MASSON's personal life. During the latter part of 1983, MALCOLM traveled to MASSON's home in Berkeley, California and conducted a series of interviews with him, which were tape-recorded and which formed the basis for the aforesaid article. Defendant MALCOLM spoke to other persons personally and professionally associated with MASSON, and published her purported findings in a novel-length article in successive issues of THE NEW YORKER, the first of which was dated December 5, 1983. Defendant THE NEW YORKER has represented to counsel for Plaintiff that the first publication of such article occurred on November 30, 1983. MALCOLM subsequently published said article in substantially identical form in book format under the title, IN THE FREUD ARCHIVES, published by Defendant KNOPF (the "Book").

14. Defendant MALCOLM's article in THE NEW YORKER, subsequently republished in book form by KNOPF, expressly purported to be based on many hours

of tape-recorded interviews with MASSON as well as on the author's personal impressions and independent research. Many parts of the article (subsequently published in book form) purported to include extensive verbatim quotations from MASSON. In fact, many of the so-called "quotations" constituted misstatements by Defendant MALCOLM of what MASSON had actually said during his interviews with her or constituted willful distortions of the context of those statements. On information and belief, Defendant MALCOLM knowingly and deliberately misstated MASSON's words or took his words out of context in the attempt to portray MASSON, using words purportedly out of his own mouth, as unscholarly, irresponsible, vain, lacking impersonal [sic] honesty and moral integrity, and thus motivated by personal considerations in his professional dispute with members of the psychoanalytic establishment and therefore unsuited for any academic or professional position requiring personal responsibility, integrity and credibility. On information and belief, Defendant MALCOLM, also sought to enhance the gossip appeal of her own story, thereby increasing its marketability and profit potential, by making MASSON appear to IMPUGN his personal and professional integrity with his own words. Such misquotations and contextual distortions included without limitation the following:

(a) MALCOLM falsely quoted MASSON as having said that he would turn Dr. Anna Freud's house in London into "a place of sex, women, fun" if he were appointed director of the Sigmund Freud archives.

(b) MALCOLM falsely quoted MASSON as having said that he changed his middle name to Moussaieff because "it sounded better."

(c) MALCOLM falsely quoted MASSON as having said that he would wait to resign from the International Psychoanalytic Association "until I can get the most effect out of it."

(d) MALCOLM falsely quoted MASSON as having said to Dr. Kurt Eissler that he [MASSON] was "not going to give . . . back" original letters of Sigmund Freud in MASSON's possession following Eissler's request that he do so.

(e) MALCOLM willfully distorted the context of certain remarks by quoting MASSON as having responded "well, he had the wrong man" to Dr. Eissler's request that he (MASSON) "live with" his termination from the Freud Archives "in silence" because that was "the honorable thing to do." In fact, MASSON responded that Eissler "had the wrong man" when Eissler proposed that "if you [MASSON] never speak about it and you quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?" The latter remarks were completely omitted from the published version of MALCOLM's article.

(f) MALCOLM willfully distorted the context of MASSON's remarks by quoting MASSON as having told the *New York Times*, *Time*, and *Newsweek* that he would "not be bound" by a promise made to the Board of Directors of the Sigmund Freud Archives not to "reveal anything that happened" at the meeting of the Board

during which MASSON was terminated as Projects Director of the Archives, implying that MASSON had not informed the Board of his intention to speak to the news media. In fact MASSON told the Board before he told the news media that he would not be bound by any promise not to reveal what transpired at such meeting.

(g) Defendant MALCOLM falsely stated that "A few days after my return to New York" following the conclusion of her interviews with MASSON, MASSON made a number of statements to her including the statement that "after Freud, he's [MASSON is] the greatest analyst who ever lived".

(h) MALCOLM falsely quoted MASSON as having said on page 38 of the Book, about himself, "I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public,"stating with words of commercial sexual overtones that MASSON had described himself as someone whose intellect was for sale and who had been willing to be dishonest about the views he purportedly held in his scholarship and intellectual activities for the purposes of monetary gain and other personal motives.

(i) MALCOLM falsely quoted MASSON as having claimed for himself certain discoveries about the Schreber case (Freud's evidence for the theory that homosexuality originates from unconscious paranoid fantasies) thereby falsely conveying to the informed readers that MASSON was dishonest because MASSON falsely claimed credit for others' discoveries and scholastic work, when in truth MASSON acknowledged that such discoveries had been made by the New York analyst William Niederland by

falsely quoting MASSON as saying "It was the same thing with my discovery about the Schreber case," and as saying "There aren't too many interpretations possible of my discovery." (Book, page 149-150).

(j) MALCOLM falsely quoted MASSON as having admitted, when questioned about controversial views he had expressed about psychoanalysis, that "I don't know why I put it in," and MALCOLM falsely described MASSON as being continually "silent" when asked to give reasons for his alleged change into an "anti-freudian", thereby conveying to the reader the falsehood that MASSON out of his own mouth had portrayed himself as an unprincipled person with no ability or scholarship to back up his positions on Freud, when in truth and in fact MASSON repeatedly gave MALCOLM reasoned explanations for those views, which explanations MALCOLM expressed. (See Book, page 53.)

(k) On page 145 to 146 of the Book, MALCOLM invented a conversation with MASSON, the woman with whom MASSON lives, and MASSON's daughter and then falsely attributed quotes to all three persons from such conversation which they did not make, thereby falsely portraying MASSON, with words purportedly from his own mouth and their mouths, as having revealed that MASSON does not care for the feelings of elderly influential people who assisted him in his career, for the woman with whom he lives, or for his own daughter, by falsely attributing to MASSON the off-hand comment, "Denise worries too much."

(l) MALCOLM invented a conversation with MASSON about his book and then falsely quotes MASSON as

having said about his book: " 'Wait til it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. They will want me back, they will say that MASSON is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up.' " In truth and in fact, MASSON told MALCOLM that he did not expect his book to be well received and did not make the invested statements which MALCOLM puts in MASSON's mouth to convey to the reader the falsehood that MASSON "in his own words" has revealed himself "as a grandiose egotist – mean-spirited, self-serving, full of braggadicio [sic], impossibly arrogant and in the end, a self-destructive fool." ("Freudianism and its malcontents"), *Boston Globe*, May 27, 1984, at 60, col. 2.

15: In falsely attributing the aforesaid statements to MASSON and in willfully distorting the context of MASSON's remarks, Defendant MALCOLM acted intentionally and with reckless and deliberate disregard for whether or not the words she attributed to MASSON corresponded to the words MASSON actually uttered during his tape-recorded interviews with her. MALCOLM assured MASSON that the text of the article to be published in THE NEW YORKER would be meticulously reviewed by "fact-checkers" and in particular that every quotation attributed to MASSON would be taken directly from the tape-recordings and would be verified for accuracy before publication. MALCOLM advised that the

"fact-checking" process would consume hours, even days, of MASSON's time. In fact, MASSON was contacted by "fact-checkers" concerning the accuracy of MALCOLM's article for only a matter of minutes, rather than hours, during which time no verification of any of the quotations attributed to MASSON and which subsequently appeared in MALCOLM's article was sought. MASSON was not subsequently contacted by "fact-checkers" in connection with the article written by MALCOLM before publication in THE NEW YORKER, despite MALCOLM's assurances that he would be so contacted and despite MASSON's advice to MALCOLM and to THE NEW YORKER, both personally and through counsel, and both before and after publication of the article, that the article written by MALCOLM and published by THE NEW YORKER contained serious inaccuracies of fact and attributed quotation. On information and belief, MALCOLM never intended to use "fact-checkers" to verify the accuracy of the facts and quotations to be published in her article about plaintiff MASSON but rather made such assurances to MASSON falsely and with the intent to induce MASSON to speak unguardedly during extended interviews with MALCOLM in the belief that he (MASSON) would have the opportunity to correct any inaccuracies of fact or quotation prior to publication. MASSON in fact advised MALCOLM's "fact-checkers", during their limited attempt to verify certain matters to be published in MALCOLM's article, of certain inaccuracies in MALCOLM's article and that extended consultation with MASSON was warranted and indeed necessary prior to publication in order to verify the accuracy of MALCOLM's article. MALCOLM nonetheless

proceeded to publish her article in THE NEW YORKER without such verification and consultation with MASSON, well knowing that facts and attributions appearing therein were inaccurate and false or with reckless disregard of whether or not they were false.

16. In addition to the aforesaid deliberately misstated and/or out-of-context attributions and misquotations, Defendant MALCOLM deliberately omitted from her account statements made by MASSON, which were omissions rendered the context in which MASSON spoke false and misleading. Said omissions included (without limitation) Defendant MALCOLM's false statement that "At no time during our acquaintance did MASSON answer my question about what had brought on his sudden virulent anti-Freudianism." Defendant MALCOLM omitted to state that MASSON had in fact answered her question at length to explain the reasons for which his views about Freud had changed over time. Rather, Defendant MALCOLM attempted to portray MASSON as evasive and intellectually dishonest. On information and belief, Defendant MALCOLM acted intentionally and recklessly in making the aforesaid omissions.

17. As a proximate result of publication of such false and knowingly inaccurate misstatements and misquotations, and of such deliberate omissions, MASSON has been exposed to hatred, contempt, ridicule and obloquy by other members of the psychoanalytic and academic communities as well as the general public, all to his general damage in an amount not yet ascertained but in any event not less than $100,000. As a further proximate result of the aforesaid misstatements, misquotations

and omissions, MASSON has been injured in his occupations as a scholar, researcher, psychoanalyst and professor, all to his special damage in an amount not yet ascertained but in any event not less than $100,000, in that:

(a) There has been a sharp decline (to zero) in the number of new grants and funding extended to MASSON by academic and research institutions including, but not limited to, the United States Department of Health and Human Services, the John Simon Guggenheim Memorial Foundation, and the National Endowment for the Humanities. MASSON is informed and believes, and on such basis alleges, that such decline is the direct and proximate result of Defendants' defamatory publications.

(b) MASSON's ability and eligibility to obtain such grants and funding in the future has been severely impaired.

(c) MASSON's ability to obtain other employment and academic affiliations in the psychoanalytic and academic areas of his profession has been severely impaired as evidenced, in part, by his inability to obtain positions at various academic institutions including, but not limited to, the University of California, California State University, and Mills College. MASSON has been informed and does believe, and on the basis of such information and belief alleges, that such inability is the direct and proximate result of Defendants' defamatory publications.

(d) MASSON is informed and believes, and on the basis of such information and belief alleges, that he cannot engage in the clinical practice of psychoanalysis

because psychoanalysts will not make professional referrals to him, extend him any professional courtesies, or involve him in a meaningful manner in psychoanalytical conferences or functions as a result of Defendants' defamatory publications.

(e) MASSON is also informed and believes, and on such basis alleges, that said special damages are continuing and MASSON prays leave of Court to amend his complaint to insert the true amount of said losses and the actual identities of other psychoanalysts and psychoanalytic research and academic institutions and entities which have denied him professional referrals, employment or funding, after discovery in this action has commenced and the same become known to him.

18. In making the aforesaid false and deliberate inaccurate misstatements and misquotations, and the aforesaid deliberate omissions, Defendant MALCOLM acted with oppression, fraud and malice, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

SECOND CAUSE OF ACTION

(Against Defendant THE NEW YORKER For Defamation)

"19. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1-18, above.

20. In republishing the false quotations and attributions contained in Defendant MALCOLM'S articles, Defendant THE NEW YORKER published statements it

knew to be false or published them with reckless and deliberate disregard of whether they were true or false. In particular, "fact-checkers" employed by the NEW YORKER to verify the accuracy of facts and quotations attributed to MASSON and who did in fact make preliminary atempts [sic] at such verification were informed by MASSON that there were serious inaccuracies in MALCOLM's article which could only be corrected through intensive review with MASSON of the matters set forth in said article, which review would likely require hours and even days. No review or "fact-checking" of more than a few minutes' duration occurred. Moreover, upon review of a galleyproof version of the second part of MALCOLM's article, MASSON through legal counsel advised both MALCOLM and NEW YORKER editors that serious inaccuracies in the article existed which ought to be corrected before publication. Despite such advice, the NEW YORKER proceeded to publish MALCOLM's article without correction and without detailed review of the inaccuracies contained therein with plaintiff MASSON.

21. As a proximate result of said false publications, MASSON has been exposed to hatred, contempt, ridicule and obloquy in the eyes of the psychoanalytic and academic communities and of the general public and he has been injured in his occupation, all to his general damage in an amount not yet ascertained but in any event not less then [sic] $100,000. As a further proximate result of the aforesaid misstatements, misquotations and omissions, MASSON has been injured in his occupations as a scholar, researcher, psychoanalyst and professor, all to his special damage in an amount not yet ascertained but in any event not less then [sic] $100,000, in that:

(a) There has been a sharp decline (to zero) in the number of new grants and funding extended to MASSON by academic and research institutions including, but not limited to, the United States Department of Health and Human Services, the John Simon Guggenheim Memorial Foundation, and the National Endowment for the Humanities. MASSON is informed and believes, and on such basis alleges, that such decline is the direct and proximate result of Defendant's defamatory publications.

(b) MASSON's ability and eligibility to obtain such grants and funding in the future has been severely impaired.

(c) MASSON's ability to obtain other employment in the psychoanalytic and academic areas of his profession has been severely impaired as evidenced, in part, by his inability to obtain positions at various academic institutions including, but not limited to, the University of California, California State University, and Mills College. MASSON has been informed and does believe, and on the basis of such information and belief alleges, that such inability is the direct and proximate result of Defendants' defamatory publications.

(d) MASSON is informed and believes, and on the basis of such information and belief alleges, that he cannot engage in the clinical practice of psychoanalysis because psychoanalysts will not make professional referrals to him, extend him any professional courtesies, or involve him in a meaningful manner in psychoanalytical conferences or functions as a result of Defendants' defamatory publications.

(e) MASSON is also informed and believes, and on such basis alleges, that said special damages are continuing and MASSON prays leave of Court to amend his complaint to insert the true amount of said losses and the actual identities of other psychoanalysts and psychoanalytic research and academic institutions and entities, which have denied him professional referrals, employment or funding after discovery in the action has commenced and the same become known to him.

22. In making the aforesaid false publications, Defendant THE NEW YORKER acted knowingly or with deliberate and reckless disregard of the truth or falsity of said publications, and further acted with oppression, fraud and malice, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

THIRD CAUSE OF ACTION

(Against Defendant KNOPF For Defamation)

23. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1-22, above.

24. In republishing the false quotations and attributions contained in Defendant MALCOLM's book IN THE FREUD ARCHIVES, Defendant KNOPF published statements it knew to be false or published them with reckless and deliberate disregard of whether or not they were true or false. On information and belief, former KNOPH [sic] editor Robert Gottlieb refused to revise or correct the text

of MALCOLM's article before publication in book form despite being advised that MASSON considered the article to contain serious inaccuracies. On information and belief, Gottlieb placed his close and long-standing personal relationship with defendant MALCOLM ahead of considerations of accuracy of the facts and quotations attributed to plaintiff MASSON, and out of regard for MALCOLM knowingly or recklessly proceeded to publish MALSOLM'S [sic] article in book form without correcting the errors and inaccuracies pointed out by MASSON.

25. As a proximate result of said false publications, MASSON has been exposed to hatred, contempt, ridicule and obloquy in the eyes of the psychoanalytic and academic communities and of the general public all to his general damage in an amount less than $100,000. As a further proximate result of the aforesaid misstatements, misquotations and omissions, MASSON has been injured in his occupations as a scholar, researcher, psychoanalyst and professor, all to his special damage in an amount not yet ascertained but in any event not less then [sic] $100,000, in that:

(a) There has been a sharp decline (to zero) in the number of new grants and funding extended to MASSON by academic and researching insitutions [sic] including, but not limited to, the United States Department of Health and Human Services, the John Simon Guggenheim Memorial Foundation, and the National Endowment for the Humanities. MASSON is informed and believes, and on such basis alleges, that such decline is the direct and proximate result of Defendants' defamatory publications.

(b) MASSON's ability and eligibility to obtain such grants and funding in the future has been severely impaired.

(c) MASSON's ability to obtain other employment in the psychoanalytic and academic areas of his profession has been severely impaired as evidenced, in part, by his inability to obtain positions at various academic institutions including, but not limited to, the University of California, California State University and Mills College. MASSON has been informed and does believe, and on the basis of such information and belief alleges, that such inability is the direct and proximate result of Defendants' defamatory publications.

(d) MASSON is informed and believes, and on the basis of such information and belief alleges, that he cannot engage in the clinical practice of psychoanalysis because psychoanalysts will not make professional referrals to him, extend him any professional courtesies, or involve him in a meaningful manner in psychoanalytical conferences or functions as a result of Defendants' defamatory publications.

(e) MASSON is also informed and believes, and on such basis alleges, that said special damages are continuing and MASSON prays leave of Court to amend his complaint to insert the true amount of said losses and the actual identities of other psychoanalysts and psychoanalytic research and academic institutions and entities, which have denied him professional referrals, employment funding after discovery in this action has commenced and the same become known to him.

26. In making the aforesaid false publications, Defendant KNOPH [sic] acted knowingly or with deliberate and reckless disregard of the truth or falsity of said publications, and further acted with oppression, fraud and malice, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

FOURTH CAUSE OF ACTION

(Against All Defendants For Invasion of Privacy)

27. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1-26, above.

28. Beginning with the publication of its December 5, 1983, issue, Defendant THE NEW YORKER, without MASSON's consent, invaded MASSON's right of privacy by publishing an article written by Defendant MALCOLM concerning MASSON containing deliberately false and out-of-context misquotations of statements uttered or purportedly uttered by Plaintiff MASSON. Said article by Defendants created publicity to the readership of Defendant THE NEW YORKER and of Defendant MALCOLM's book IN THE FREUD ARCHIVES published by Defendant KNOPF, which publicity placed MASSON in a false light in the public eye by incorrectly portraying MASSON as a person unsuited for acedemic [sic] or professional responsibility because he lacked personal and professional honesty, integrity and responsibility.

29. As a proximate result of the aforesaid "false light" publicity, MASSON has been exposed to hatred, contempt, ridicule and obloquy, has suffered loss of reputation and standing in the community at large and in the psychoanalytic and academic communities in particular, all of which has caused him, his family and his friends humiliation, embarrassment, mental anguish and suffering, all to his general damage in an amount not yet ascertained but in any event not less than $100,000.

30. As a further proximate result of the aforesaid "false light" publicity, MASSON has been injured in his trades and businesses as a scholar, researcher, psychoanalyst and professor, all to his special damage in an amount not yet ascertained but in any event not less then [sic] $100,000, in that:

(a) There has been a sharp decline (to zero) in the number of new grants and funding extended to MASSON by academic and research institutions including, but not limited to, the United States Department of Health and Human Services, the John Simon Guggenheim Memorial Foundation, and the National Endowment for the Humanities. MASSON is informed and believes, and on such basis alleges, that such decline is the direct and proximate result of Defendants' defamatory publications.

(b) MASSON's ability and eligibility to obtain such grants and funding in the future has been severely impaired.

(c) MASSON's ability to obtain other employment in the psychoanalytic and academic areas of his profession has been severely impaired as evidenced, in part, by

his inability to obtain positions at various academic institutions including, but not limited to, the University of California, California State University, and Mills College. MASSON has been informed and does believe, and on the basis of such information and belief alleges, that such inability is the direct and proximate result of Defendants' defamatory publications.

(d) MASSON is informed and believes, and on the basis of such information and belief alleges, that he cannot engage in the clinical practice of psychoanalysis because psychoanalysts will not make professional referrals to him, extend him any professional courtesies, or involve him in a meaningful manner in psychoanalytical conferences or functions as a result of Defendants' defamatory publications.

(e) MASSON is also informed and believes, and on such basis alleges, that said special damages are continuing and MASSON prays leave of Court to amend his complaint to insert the true amount of said losses and the actual identities of other psychoanalysts and psychoanalytic research and academic institutions and entities, which have denied him professional referrals, employment or funding after discovery in this action has commenced and the same become known to him.

31. In creating the aforesaid "false light" publicity, Defendants and each of them acted with knowledge of the falsity of the aforesaid attributions or with reckless disregard of whether or not they were true or false, as hereinabove alleged, and further acted with oppression, fraud and malice, and MASSON is therefore entitled to an

award of punitive damages in an amount of not less then [sic] ten million dollars ($10,000,000).

WHEREFORE, MASSON prays for judgment as follows:

1. For general damages in an amount not yet ascertained but in any event not less then [sic] $100,000.

2. For special damages in an amount not yet ascertained but in any event not less than $100,000.

3. For punitive damges [sic] in an amount not less than ten million dollars ($10,000,000).

4. For costs of suit herein, including a reasonable attorneys' fee.

5. For such other and further relief as the Court deems proper and just.

JURY DEMAND

Plaintiff MASSON demands trial by jury on all causes of action in this Complaint.

Dated: July 18, 1986

Respectfully submitted,

CARROLL & HAINES,

By: /s/ Michael Brooks Carroll E.F.
Michael Brooks Carroll
Attorneys for Plaintiff
JEFFREY M. MASSON

VERIFICATION

I, JEFFREY M. MASSON, declare under penalty of perjury pursuant to the laws of the state of California as

follows: that I am the Plaintiff in this matter; that I am familiar with the contents of the Amendment to Third Amended Complaint for and Fourth Amended Complaint for Defamation and Invasion of Privacy and that the matters stated therein are true.

Executed at San Francisco, California on May ___, 1986.

/s/ Jeffrey M. Masson
Jeffrey M. Masson

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
101 California Street, 16th Floor
San Francisco, California 94111
Telephone: (415) 433-1900

Attorneys for Defendants
JANET MALCOLM, THE NEW YORKER MAGAZINE, INC., and ALFRED A. KNOPF, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, v. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	No. 84 7548 EFL ANSWER TO FOURTH AMENDED COMPLAINT [Jury Trial Demanded] (Filed OCT 2-1986)

Defendants THE NEW YORKER MAGAZINE, INC. (hereinafter, "THE NEW YORKER"), ALFRED A. KNOPF, INC. (hereinafter, "KNOPF"), and JANET MALCOLM (hereinafter, "MALCOLM") answer the fourth amended complaint herein as follows:

JURISDICTION

1. Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 1, and on that basis defendants deny each and every one of them.

2. Admitted.

3. Admitted.

4. Admitted.

5. Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 5, and on that basis defendants deny each and every one of them.

6. Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 6, and on that basis defendants deny each and every one of them.

FIRST CAUSE OF ACTION

7. Defendants are informed and believe that plaintiff has studied Sanskrit and psychoanalysis, that plaintiff was associated with the Sigmund Freud Archives as projects director and otherwise, that he was acquainted with Dr. Kurt Eissler and Dr. Anna Freud, and that in the course of the foregoing he had access to unpublished materials pertaining to psychoanalysis, including some of Freud's correspondence. Except as expressly so admitted, defendants lack information or belief sufficient to permit them to admit or deny the allegations of the subject paragraph, and on that basis defendants deny each and every one of them.

8, 9 and 10. Defendants admit that plaintiff has publicly espoused a hypothesis or group of hypotheses concerning Freud's abandonment of the seduction theory. Except as so admitted, defendants lack information or belief sufficient to permit them to admit or deny the allegations of the subject paragraphs, and on that basis defendants deny each and every one of them.

11. Defendants admit that plaintiff wrote and caused to be published in 1984 a book entitled *The Assault on Truth: Freud's Suppression of the Seduction Theory*. Except as expressly so admitted, defendants lack information or belief sufficient to permit them to admit or deny the allegations of the subject paragraph, and on that basis defendants deny each and every one of them.

12. Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 12, and on that basis defendants deny each and every one of them.

13. Defendant MALCOLM wrote an article which appeared in the issues of *The New Yorker Magazine* dated December 5, 1983, and December 12, 1983. A copy of said article was filed in this action by plaintiff on or about March 1, 1985. Defendants admit that plaintiff was one of the subjects of said article, that defendant MALCOLM travelled to Berkeley, California, to speak with plaintiff in preparing the article, and that defendant MALCOLM did speak to plaintiff numerous times in Berkeley and elsewhere in preparation of the article. Defendant MALCOLM tape-recorded some but not all of her interviews with plaintiff. The interviews with plaintiff, as well as other interviews, formed a partial basis for the subject article. The book *In the Freud Archives*, published by defendant KNOPF, is substantially similar to the article, but is not identical thereto. Except as expressly admitted herein, defendants deny the allegations of paragraph 13.

14. Both the subject article and the book *In the Freud Archives* contain quotations of plaintiff, which are identified as such. The words in quotation marks in subparts (a) through (l) of Paragraph 14 appear in the subject

article, except for the words in quotation marks on lines 12-16 of page 9. Except as so admitted, these defendants deny each and every allegation of paragraph 14. Without limiting this denial, defendants specifically deny that plaintiff was inaccurately quoted in the subject publications.

15. Answering paragraph 15, defendants admit that plaintiff was contacted by fact-checkers employed by defendant NEW YORKER. Defendants also admit that an attorney purporting to speak for plaintiff telephoned defendant NEW YORKER after the subject articles had gone to press, and suggested that the articles might invade plaintiff's privacy. The allegations of paragraph 15 are in all other respects denied. Without limiting this denial, defendants specifically deny that any alleged inaccuracies were brought to their attention at any time before publication of the subject articles.

16-18. Answering paragraphs 16, 17, and 18, these defendants deny each and every allegation thereof, and specifically deny that plaintiff has been damaged in the manner or amounts stated, or in any manner or amount.

SECOND CAUSE OF ACTION

19. These defendants incorporate their answers to paragraphs 1 through 18 of the complaint.

20-22. These defendants deny each and every allegation of paragraphs 20, 21, and 22, and specifically deny that plaintiff has been damaged in the manner or amounts stated, or in any manner or amount.

THIRD CAUSE OF ACTION

23. These defendants incorporate their answers to paragraphs 1-22 of the complaint, above.

24-26. These defendants deny each and every allegation of paragraphs 24-26, and specifically deny that plaintiff has been damaged in the manner or amounts stated, or in any manner or amount.

FOURTH CAUSE OF ACTION

27. Answering paragraph 27, these defendants incorporate their answers to paragraphs 1-26, above.

28-31. These defendants deny each and every allegation of paragraphs 28 through 31, and specifically deny that plaintiff has been damaged in the manner or amounts stated, or in any manner or amount.

FIRST AFFIRMATIVE DEFENSE:
FAILURE TO STATE A CLAIM

36. The complaint, and each cause of action thereof, fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE:
CONSTITUTIONAL PRIVILEGE

37. Defendants' actions in preparing the subject publications, and the publications themselves, were and are privileged and protected by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution. Those protections and privileges defeat, limit, or reduce any potential liability to plaintiff.

THIRD AFFIRMATIVE DEFENSE: STATEMENT CONCERNING PUBLIC FIGURE

38. At all times relevant hereto, plaintiff was embroiled in one or more controversies concerning his views on the history of psychoanalysis and the etiology of mental and emotional disorders, his involvement with the Sigmund Freud Archives (hereinafter, "Archives"), the practices of the Archives concerning release of historical materials and information in their custody, plaintiff's personal and professional relations with Dr. Kurt Eissler and the late Anna Freud, and the circumstances surrounding the severance of plaintiff's relations with the Sigmund Freud Archives. These controversies sometimes involved vitriolic personal and professional attacks by and against plaintiff and others. Plaintiff charged, among other things, that Anna Freud and others connected with the Archives were engaged in the suppression of key historical truths concerning Sigmund Freud. Plaintiff also impugned the intellectual integrity of Sigmund Freud, and declared that Freud and all psychoanalysts were and are "corrupt."

39. Plaintiff sought and obtained publicity for his views both in academic circles and in the mass media. In fact plaintiff single-handedly created several of the controversies referred to herein, and played a significant and deliberately prominent role in all of them. Plaintiff voluntarily injected himself into these public controversies, and is a public figure for purposes of this lawsuit. Accordingly, defendants cannot be subject to liability for publishing the statements complained of unless plaintiff proves, in addition to all other elements of his case, that

defendants knew their statements were false, or published those statements with reckless disregard for their truth or falsity. Defendants, however, did not know the statements were false, if they were, and did not publish them with reckless disregard of truth or falsity.

FOURTH AFFIRMATIVE DEFENSE: PRIVILEGE UNDER CALIFORNIA CIVIL CODE SECTION 47(3)

40. The statements complained of were made without malice to persons interested therein by persons who were also interested, and who stood in such relation to the readers as to afford a reasonable ground for supposing the motive for the communication innocent. Accordingly, the challenged publications were and are privileged under Section 47, Subdivision 3, of the California Civil Code.

FIFTH AFFIRMATIVE DEFENSE: REPORT FOR PUBLIC BENEFIT

41. The statements complained of were a fair and true report for the public benefit, and as such were and are privileged under Section 47, Subdivision 5, and of the California Civil Code.

SIXTH AFFIRMATIVE DEFENSE: REPORT OF OFFICIAL PROCEEDING

42. The statements complained of consisted, in whole or part, of fair and true reports concerning judicial proceedings between plaintiff and the Sigmund Freud Archives, as well as proceedings within the Archives.

Under Section 47, Subdivision 4, of the California Civil Code, the publications were and are to that extent absolutely privileged.

SEVENTH AFFIRMATIVE DEFENSE:
NEUTRAL REPORTAGE

43. The statements complained of consisted, in whole or part, of neutral reports of charges made against plaintiff, a public figure, on matters of substantial public interest and importance. Accordingly, under the doctrine of neutral reportage, the statements are to that extent not actionable.

EIGHTH AFFIRMATIVE DEFENSE:
NEWSWORTHINESS

44. The publications in question were newsworthy.

NINTH AFFIRMATIVE DEFENSE:
CONSENT AND ASSUMPTION OF RISK

45. At all relevant times, plaintiff knew or should have known that defendant MALCOLM intended to write, and defendant THE NEW YORKER to publish, an article concerning plaintiff; that the article might be unflattering to plaintiff; that the article might and probably would disclose personal details of plaintiff's life; and that plaintiff would have no control over what defendants ultimately published. In particular, at various times plaintiff asked MALCOLM what she intended to put into the subject article on various subjects, *i.e.*, what she intended to write. MALCOLM repeatedly stated in response to these inquiries that she was unwilling to say

what she would write and that to do so would violate the policies of THE NEW YORKER as well as her own policies. Due to these exchanges plaintiff knew or should have known (and he in fact acknowledged) that he enjoyed no "pre-publication clearance rights" or other right or power to influence the contents of the subject articles.

46. Despite this knowledge or notice, plaintiff participated freely in the preparation of the challenged publications without requesting or receiving any assurance whatsoever about their content or his own future role in their publication. In fact, for the purpose of encouraging defendants to publish the article and thereby afford further publicity to himself, his views, and his then-forthcoming book, plaintiff made numerous statements to MALCOLM which were intended to and did induce her to believe that she was completely free to characterize plaintiff and the controversies in which plaintiff was involved as she saw fit, and to reveal such facts as she deemed pertinent to a profile of plaintiff and a description of those controversies. Among other such statements, plaintiff said that he was willing to provide written assurances that defendants MALCOLM and THE NEW YORKER were free to say anything whatsoever about him, personal or professional, and he would not sue; that the article would probably have a negative tone; that his views or statements might appear in the article in a manner he would consider distorted but "that is a risk one takes"; that he felt "everybody should talk about everything"; that he was speaking very openly and was telling MALCOLM everything he considered in any way relevant to his life connected with psychoanalysis; that

other interviewees, including Dr. Eissler, should likewise speak openly about their personal and professional relations and conflicts with plaintiff; that plaintiff understood he should and would have no control over what MALCOLM wrote; that he did not believe anything in his past should be hidden; that he strongly believed everything he had ever done, talked about, thought, or believed should be open to scrutiny; that there was nothing he had told MALCOLM which he felt she could not publish; that MALCOLM could publish anything plaintiff had told her; that plaintiff expected MALCOLM not to avoid his personal side; that there was "no reason to stay away from anything, really"; that MALCOLM could reveal anything plaintiff told her, to anyone she chose; and that plaintiff was not speaking to MALCOLM in confidence.

47. The foregoing assurances, statements, and denials, and other similar statements by plaintiff, constituted his express consent, authorization, assumption of risk, and invitation to defendants to publish the articles complained of. In addition, by his conduct plaintiff impliedly consented to the publication of those articles, and assumed the risk of any injury resulting therefrom.

TENTH AFFIRMATIVE DEFENSE: WAIVER, RELEASE, AND ESTOPPEL

48. Plaintiff's statements and conduct, in light of his knowledge, constitute an express and implied waiver, release, and relinquishment of the cause of action herein sought to be asserted.

49. Plaintiff is estopped by this words and conduct from maintaining the cause of action herein sought to be asserted.

ELEVENTH AFFIRMATIVE DEFENSE: FAILURE TO REQUEST RETRACTION

50. At no time before or after the publication of the statements complained of did plaintiff request of defendants, or any of them, that any of said statements be corrected or retracted. Plaintiff's failure to do so precludes any recovery of general or punitive damages, pursuant to Section 48a of the California Civil Code. Furthermore, and independent of that statute, plaintiff's conduct constitutes an unreasonable failure to seek to mitigate his damages, and reduces accordingly any potential liability of these answering defendants.

TWELFTH AFFIRMATIVE DEFENSE: FAULT OF PLAINTIFF

51. At all relevant times, plaintiff himself was at fault in and about the matters set forth in the complaint. Plaintiff's fault included, but was not limited to, failure to exercise reasonable care to protect his own reputational and privacy interests, and negligent, reckless, or willful misstatements to defendants resulting in the publications complained of. Plaintiff's fault proximately caused and contributed to his damage, if any, and accordingly reduces or eliminates any potential liability of these answering defendants.

THIRTEENTH AFFIRMATIVE DEFENSE: FAULT OF THIRD PERSONS

52. If the damages alleged in the complaint were in fact sustained by plaintiff, they were caused in whole or part, negligently or otherwise, by persons, firms, or entities other than these answering defendants, and the percentage of any potential liability of these defendants should be reduced accordingly under the doctrines of contribution, indemnity, and apportionment of fault.

FOURTEENTH AFFIRMATIVE DEFENSE: GOOD FAITH BELIEF IN TRUTH

53. At the time of the publications by defendants of which plaintiff complains, these answering defendants, and each of them, believed in good faith in the substantial truth thereof. Such good faith belief constitutes either justification affording a complete defense to plaintiff's claims, or mitigation reducing any potential liability of these answering defendants.

ALLEGATION IN SUPPORT OF ATTORNEYS' FEES

55. On information and belief, the complaint herein is not well grounded in fact nor warranted by existing law, and this action was not filed, nor can it be maintained, in good faith and with reasonable cause. Facts known to plaintiff and his attorneys establish as a matter of law that the publications complained of are substantially true and are not defamatory of plaintiff, that there was no actionable invasion of plaintiff's privacy, that plaintiff invited any harm he may have suffered, and that for these and other equally dispositive reasons the claims

asserted herein are utterly without merit. Notwithstanding this knowledge, plaintiff instituted the within lawsuit in order to attract public attention and thereby increase the sales of his various publications, or for other improper reasons. Accordingly, defendants will seek an award of attorneys' fees pursuant to Federal Rule 11, California Code of Civil Procedure section 1021.7, and the Court's inherent and equitable powers.

PRAYER

Defendants pray that:

1. Judgment be entered for defendants, plaintiff taking nothing;

2. Defendants be awarded their costs of suit;

3. Defendants recover their attorneys' fees; and

4. The Court grant such other and further relief as its deems proper.

JURY DEMAND

These defendants hereby demand trial by jury in this matter.

DATED: October 1, 1986.

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
By /s/ Charles W. Kenady
CHARLES W. KENADY

Attorneys for Defendants
JANET MALCOLM, THE NEW YORKER MAGAZINE, INC., and ALFRED A. KNOPF, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[No. C-84-7548 EFL; August 19, 1986]

JEFFREY M. MASSON,
Plaintiff

v.

THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM,

Defendants

PARTIAL SUMMARY JUDGMENT

This document appears as Appendix C to the Petition for Writ of Certiorari

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COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
101 California Street, 16th Floor
San Francisco, California 94111
Telephone: (415) 433-1900

Attorneys for Defendants
JANET MALCOLM, THE NEW YORKER MAGAZINE, INC., and ALFRED A. KNOPF, INC.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, v. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	) No. 84 7548 EFL)) DECLARATION OF) JANET MALCOM) IN SUPPORT OF) DEFENDANTS' MOTION) FOR SUMMARY) JUDGMENT)) Date: May 22, 1987) Time: 10:00 a.m.) Place: Courtroom 4

1. I, Janet Malcolm, am the author of the two-part article "Trouble in the Archives" which appeared in *The New Yorker Magazine* on December 5 and 12, 1983, and the book "In the Freud Archives" which was published by Knopf in 1984. I make this declaration of personal knowledge and if called as a witness I could and would testify competently to the matters stated herein.

2. I have been a professional journalist for about 20 years, primarily as a staff writer for *The New Yorker Magazine*, contributing factual articles, essays and reviews. I have also written for *The New Republic*, *The Nation*, and the *New York Review of Books*.

3. I first wrote about psychoanalysis in "The Impossible Profession," a two-part article published in *The New Yorker Magazine*, which became a book.

4. I came to write about Mr. Masson as follows: I first heard of him in the summer of 1981 when a series of long articles by Ralph Blumenthal appeared in the Science section of the New York Times, dealing with Mr. Masson's research into early Freudian history and his novel perspective on Freud's seduction theory. These articles were shortly followed by a news item to the effect that Mr. Masson had been fired from his position as Projects director of the Sigmund Freud Archives. (For a fuller treatment of these events, see my book.) I clipped this item for possible future reference and, a year later, in October 1982, I telephoned Mr. Masson and told him that I thought I would like to write about him in *The New Yorker*. He responded by saying that he had had a premonition that I would call. He told me that he had a fascinating story to tell about his research, his relationship with Anna Freud, his firing from the Archives, and his disillusionment with psychoanalysis. He urged me to fly out to Berkeley as soon as possible to hear his story.

5. I spoke to the editor of the magazine, William Shawn, and he approved the idea of an article about Mr. Masson. I called Mr. Masson again and we made arrangements for my trip to California.

6. I spent approximately a week in Berkeley, sometime around Election Day of 1982, and met daily with Mr. Masson.

7. I tape-recorded a great many of my conversations with Mr. Masson in Berkeley and later on the telephone between New York and Berkeley, and most of the quotations from him in my article/book are near-verbatim selections from the recordings. There were also a great many conversations – while walking, driving and during meals in Berkeley, on the telephone, and during a later visit to New York – that were not recorded, but upon which I drew in writing my piece. During some of these untaped conversations I took notes, and during others I did not.

8. I worked on the article for about eight months and wrote it in the spring and summer of 1983. I interviewed more than a dozen individuals who had been personally or professionally acquainted with Mr. Masson. I talked to all these people at Mr. Masson's suggestion, with one exception, Elise Snyder. (Interviews, Tape 5, Side B at 59:17 to 62:8.)

9. The statement in Mr. Masson's Complaint that "Malcolm assured Masson . . . that every quotation attributed to Masson would be taken directly from the tape-recordings and would be verified for accuracy before publication" is unfounded. In all my years of writing articles for *The New Yorker* I have never made any such assurances. With one exception I have never checked quotations with a subject. I told Mr. Masson that it was not my practice to show my articles to people who appear

in them before publication, and he agreed to this condition of our work together. (Interviews, Tape 9, Side A, at 7:4-10; at 8:10-12.)

10. I do not think, and did not think before publication, that any quotations in the article or book were distorted or taken out of context. In his complaint Mr. Masson writes "she focused [her article] not primarily on Masson's scholarship or the research behind his work, but instead primarily on Masson's personal life." This is not true. The focus of the article was an episode in the history of organized psychoanalysis with special reference to the Sigmund Freud archives, and not Masson's personal life. But even if the piece had been about nothing but Mr. Masson's personal life, I believe it is my right under the First Amendment to write about what I want to and not to be dictated to by someone seeking publicity for a book. As it happens, Mr. Masson both implicitly and expressly encouraged me to write about his personal life. He said during our interviews "one doesn't want to avoid either the personal side about me and my whole life nor the side connected with my discoveries. [T]here is no reason to stay away from anything, really." (Tape 4, Side B, at 50:21-24. See also Tape 3, Side B, at 59:1-9, Mr. Masson saying he should have no control over what I wrote, and Tape 3, Side B at 60:6 to 62:28, saying that everything in his life should be open, and nothing should be hidden.)

I quoted Mr. Masson accurately, I presented him as he presented himself to me, and in writing my article/book I was consistently and solely guided by the ambition of making him as lifelike and real as possible so that my readers would get the same sense of him that I had

received from actually knowing him. I invented nothing. I never harbored the slightest ill-will toward Mr. Masson – I enjoyed his irreverence and impudence very much – and, of course, I would have preferred that he liked what I wrote about him than that he didn't. But I consider harassing legal action such as Mr. Masson's a breach of the unspoken contract between subject and author, namely that when you consent to being written about – and Mr. Masson more than consented to being written about by me – you accept the risk that the portrait of you that results may not be the one you yourself would have painted. Mr. Masson told me on several occasions that he liked my writing style and thought that my detachment from the subject, and non-affiliation with his views, would make the article more believable, and would help his cause. (*E.g.*, Tape 8, Side B at 46-48.) In another context, he volunteered to give me and *The New Yorker* a letter promising he would not sue us or Dr. Eissler. (Tape 4, Side A at 8:14 to 12:8, especially 9:2-5, 12:1-8; Tape 4, Side B at 58:7-19.)

11. Mr. Masson very much wanted me to write about him. He exhibited himself to me as an irreverent, irrepressible, disdainful, provocative person who enjoyed shocking and irritating the stuffy people of the psychoanalytic establishment. He was disdainful of most people in the world and he found most of the people in the fields of Sanskrit and psychoanalysis foolish and boring, lacking in brains, wit, and physical beauty. After reading the transcript of our conversations, I am not only more than satisfied that my portrait of Mr. Masson is accurate, but I am struck anew with how restrained it is. Far from being actuated by malice, I seem to have been actuated by a

wish to protect him from himself when he got carried away and either told me things that were deviations from conventional morality (such as his extra-marital affairs) or were nonsensical (such as his idea that psychotherapy should be an unpaid relationship between two people who go to bed together and talk about it).

12. Paragraph 14(b) of Plaintiff's Fourth Amended Complaint alleges that I falsely quoted Mr. Masson as having said that he changed his middle name to Moussaieff because "it sounded better." The primary source of this quotation is Tape 10, Side B, pages 30-31 in the tape-recorded interviews between Mr. Masson and me, although we had discussed this question several times earlier. He had volunteered that he was born with the middle name "Lloyd" and I asked him to tell me again what the name change had been about. The name "Moussaieff," Mr. Masson explained, had been his paternal grandfather's name before it was changed to Masson. He changed it because, "I just liked it" better, apparently because it sounded better. I firmly believe, and believed when I wrote the article, that the article's description of the name change accurately conveyed Mr. Masson's explanation.

13. Paragraph 14(e) of Mr. Masson's Fourth Amended Complaint alleges that I "willfully distorted the context" of certain remarks Mr. Masson made regarding Dr. Eissler's request that he "just live with" his firing in silence. ("In the Freud archives [sic]," Vintage Books edition, hereafter "Book," at 67. True and correct copies of pages from the Book are attached hereto as Exhibit A.) Mr. Masson explained that Dr. Eissler requested, "Well, you could never talk about it. You could be silent about it.

You could swallow it. I know it's painful for you but just live with it in silence." Mr. Masson told me that his response to Dr. Eissler was, "Fuck you. Why should I do that? Why? You know, why should one do that?" Dr. Eissler's rejoinder was, "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?" Mr. Masson then said, "Well, he had the wrong man. Really, I mean, that's just not, not for me." This passage was taken directly from my type-written notes. It is also in the tape-recorded transcript, Tape 9, Side B, page 42. The omission of part of Mr. Masson's monologue was part of the selection process through which an intelligible written text is formed. There was no intention on my part to distort the contents of this statement, and I had and still have no doubt that I was accurately quoting Mr. Masson and did not distort the context of his remarks.

14. Paragraph 14(g) of Plaintiff's Fourth Amended Complaint states that I falsely quoted Mr. Masson as stating that others would one day say "after Freud, he's [Masson is] the greatest analyst who ever lived." This statement comes verbatim from a passage in my typewritten notes of statements made by Mr. Masson in a visit to my house in New York. (I later typed out notes I had written as Mr. Masson talked and used them to write the article. A true and correct copy of these notes is attached hereto as Exhibit B.) Mr. Masson predicted that after his book hit the best-seller list, "the analysts will crawl back," and will say that "after Freud, he's the greatest

analyst who ever lived." This statement was a near-repetition of what Mr. Masson had said in a telephone conversation with me after his book was accepted. Moreover, my taped interviews with Mr. Masson are replete with similar examples of extravagant statements. (*E.g.*, Tape 8, Side B, at 51:11-12 ("analysis stands or falls with me now"); Tape 9, Side A, at 30:17-19 (his book would be "the beginning of the end of analysis as a profession"); Tape 1, Side A, at 2:23-25; Tape 1, Side B at 39; Tape 2, Side A at 5:4-12; Tape 5, Side B at 33:16-26; Tape 6, Side B at 61:21 to 62:2 ("it's me alone"; "I hold a position that no other analyst holds"); Tape 13, Side B at 40:15-28; Tape 16, Side A at 16:25-28; Tape 17, Side B at 44:8-9, at 53:14-21, at 55:10-13 (his book will "bring down psychoanalysis"); Tape 19, Side A at 4:22-23, at 13:2-26; Tape 19, Side B at 35:23 to 36:15, at 41:26-27; Tape 26, Side A at 8:11-19; Tape 21, at 19:16-27 (again, he predicted that his book would be the "beginning of the end" for psychoanalysis).

15. Paragraph 14(h) of Plaintiff's Fourth Amended Complaint charges that I misquoted Mr. Masson as saying, "I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public." On the occasion that Mr. Masson made the statements referred to in paragraph 14(g), he also stated, "I was like a fantasy of Anna Freud's. She liked to hear that analysts are such creeps, dolts, etc. I was giving her a good time. I was like an intellectual gigolo. You get your pleasure from him. I was like a very expensive cat – an elegant cat – that was dangerous to let out of the house." Those statements appear in my typewritten notes. (Exhibit B hereto.)

16 Paragraph 14(i) of plaintiff's Fourth Amended Complaint alleges that I falsely quoted Masson as saying, "It was the same thing with my discovery about the Schreber case," and as saying, "There aren't too many interpretations possible of my discovery," when in truth Masson acknowledged that such discoveries had been made by the New York analyst William Niederland. Plaintiff himself is taking the referenced quotations out of context. In a lengthy discussion at pages 77 to 81 of the book's paperback version (Exhibit A hereto), I refer to the Schreber case. Later, at pages 149-50, the above quotes appear. It was not my intention, however, nor does the article state that Masson claimed that the original or primary discoveries about the realities behind the Schreber case had been his. Mr. Masson is not quoted as having claimed to have made the discovery about Schreber's father, he is quoted as having claimed a discovery about Schreber's psychiatrist. Book p. 149. The early passages of the book (pages 77-83) explain that Masson became interested in the Schreber case after the *initial discoveries* about the Schreber case were made by Niederland. On tape, Masson claimed to have gone "a step beyond Niederland but it was important" and made a discovery of his own in the form of an article he found at the Freud house. (Tape 2, Side B at 47:22 to 50:19.) Indeed, in the book Masson is reported as acknowledging, but challenging, Niederland's position. (Paperback at 77-81, 83, 149-150.) My book, in fact, suggested that the "psychoanalytic establishment proved unequal to the task of making the Freudian position cogent." (Book at 81.)

Masson is reported in the book as having claimed to have found an 1884 article in Freud's library written by

Paul Flechsig, Schreber's psychiatrist, which had been sent to Freud and which meant that when Freud wrote his essay on Schreber he knew that castrations had taken place in the asylum where Schreber was held. (Book at 149.) Masson in fact told me that Niederland didn't know that Freud had the article by Flechsig in his possession; that "I now know for sure something that was not known before: namely that Freud wrote to Ferenczi, 'The father was a tyrant' "; and that readers could only accuse him of "discovering" the wrong thing. (Tape 9, Side A at 3:17 to 5:28.) Masson said, "I'm the first person to know that." (Tape 1, Side B at 61:25.) In fact, Mr. Masson refers on many occasions to "discovering" things about the Schreber case. (Tape 9, Side A at 3:17-19; at 5:8-9; at 5:27-28; at 4:12-14; Tape 1, Side B at 61:16 to 62:3.) In fact, one general theme of the interviews is that he "discovered" a great many things. E.g., Tape 1 at 3; Tape 2 at 29:11-13; Tape 4 at 36:26-28; Tape 4 at 50:20-28; Tape 8, Side B at 51; Tape 13, at 19:23 to 20:7; Tape 13 at 35:17-19, at 40:10-11; Tape 17, at 31:10-12; Tape 22 at 22:10-12. He also told me, "I don't think there are too many interpretations possible" of the materials he had discovered. (Tape 22 at 18:1-2.) Finally, in a letter to the Board of Directors of the Freud Archives, dated October 18, 1981, which Mr. Masson furnished me before I wrote the article, he referred to "all the discoveries I have been making during my research." (A copy of this letter is attached hereto as Exhibit C.)

17. Paragraph 14(j) of the Plaintiff's Fourth Amended Complaint alleges that I falsely quoted Masson as having admitted, "I don't know why I put it in," in reference to the last paragraph of a paper Masson wrote.

This paragraph also claims that my book falsely described Masson as being "silent" about the reasons for his change into an anti-Freudian. The passages in question are at pages 53-54 and 57-58 of the paperback version of the book (Exhibit A hereto). I was referring to a paper Masson had delivered in New Haven, a paper which I described as "scholarly and fairly quiet" and respectful of Freud. (Book at 53.) I asked him to explain what had happened since the time of that lecture/paper to change his views. I said that he "sidestepped my question" and quoted him saying, "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in. The paper was very scholarly, and I thought analysts would be fascinated by my discoveries and would receive them with great warmth." (Book at 54.) After giving a long account of Masson's views, I then wrote:

> "At no time during our acquaintance did Masson answer my question about what had brought on his sudden virulent anti-Freudianism. As I came to realize, it was not the right question – as is probably the case with all unanswered (unanswerable) questions. . . . But if Masson was silent about – and possibly ignorant of – the motive for his psychoanalytic volteface, he was anything but reticent about the reversal of his fortunes that the Blumenthal articles brought about."

(Book at 57-58.)

The above passages convey my opinion that Mr. Masson gave no single, simple, satisfactory explanation for his evolution from a Freudian into an anti-Freudian, and

that on many occasions he sidestepped my question. I firmly believed that to be true, and still do. I also believe – and I explained in the article – that the question is probably *unanswerable*, and that the real question was why Mr. Masson had ever adhered to traditional Freudian views. I tried to, and did, give much of Mr. Masson's explanations of his views. But while Mr. Masson went on at great length about his views of, and condemnation of, Freud and the Freudian school, he never, at least in my opinion, gave a satisfactory explanation of what caused the transformation in his views.

Much of the material from page 54 of my book comes from Tape 1, page 3 of the interview tapes. Other portions of the material come from Tape 6, Side B, pages 50-51. As to the last paragraph of his paper, Mr. Masson said, "I think the last sentence was an in, possibly, gratuitously offensive way to end a paper to a group of analysts." (Tape 6 at 50:22-23.) That statement conveyed the impression to me that Masson "didn't know why" he put the last statement in, given its possibly offensive nature, which is how I quoted him in the book. I also remember than on one occasion Mr. Masson said, "I don't know why I put it in," which lodged itself in my mind. Finally, in a letter to the Board of Directors of the Freud Archives dated October 12, 1981, a copy of which is attached as Exhibit D hereto, at page 5 thereof, Mr. Masson said, "I agree that this paragraph of my paper was unfortunate, and poorly worded." This too conveyed the impression to me that Mr. Masson didn't know why he put the last paragraph in. I believed then, and believe now, that the book accurately conveyed Masson's views about his work

and his papers. I also gave my own views about the inevitability of the change in Masson's views.

18. Paragraph 14(k) of Plaintiff's Fourth Amended Complaint charges that I invented a conversation with Masson, his girlfriend Denise, and his daughter Simone, and then falsely attributed quotes to all three people, including the quote from him that, "Denise worries too much." There are several sources of the passage in question, which appears at pages 145-46 of the book.

I had lunch at Mr. Masson's house at which Denise, her daughter and Simone were present. Although I did not tape-record the conversation between Masson, Denise and Simone at Masson's house, I subsequently made notes on, and tape-recorded two further conversations on the same subject – that of Denise's concern about Masson's apparent indifference to the wounded feelings of Dr. Eissler. One of these conversations took place in a car on the way from San Francisco's Chinatown to the house of Frits Staal for cocktails, and the other at Frits Staal's house. The latter was tape-recorded, the former was not. Using my notes and the tape-recording to guide me, I reconstructed the lunch conversation. The phrase "Denise worries too much," which appears in neither the tape nor in my notes, is one I remembered Mr. Masson as saying at lunch and in the car. My intention in including this conversation in my article/book was to bring out an aspect of Denise's character – her empathy for a person she didn't know – and Masson's "Denise worries too much" was, I think, his way of saying that she didn't fully understand the complex situation between himself and Eissler.

19. Paragraph 14(l) of Plaintiff's Fourth Amended Complaint falsely alleges that I invented a conversation with Mr. Masson about his book and then falsely quoted him as having said, "Wait 'til it reaches the best-seller list, and watch how the analysts will crawl. . . . They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up." The source of these quotations is a conversation I had with Mr. Masson during a visit Mr. Masson paid to me in New York in May, 1983, when he was in New York to promote his book. I took notes of that conversation, because my tape-recorder was broken at the time (I had tripped over its cord and broken it). I later typed my notes (Exhibit B hereto) which read: "You watch when this book hits the best seller list, the analysts will crawl back. They move whichever way the wind blows. They will want me back, they will say Masson is a great scholar, a major analyst, after Freud he's the greatest analyst who every lived. Suddenly they will be calling, begging, cajoling, please take back what you've said about the profession, our patients are quitting. . . . They will try a short smear campaign, then they'll try to buy me, ultimately they will have to shut up. Judgment will be passed by history. There is no refutation of this book possible. It's going to cause a revolution in psychoanalysis." Mr. Masson had made similar statements in a phone call to me after the publisher accepted his book,

and during other telephone conversations. Finally, the statement, "Analysis stands or falls with me now," which closes the above paragraph at page 162 of the book, appears at Tape 8, Side B, at 51 of the interviews.

20. I firmly believe now, and I strongly believed before publication, that all of the material and the quotations in the article and book were substantially accurate quotations from what Mr. Masson said. I also believe that the article and book, as a whole, were fair to Mr. Masson and did not portray him in a false, derogatory or defamatory light. I have never entertained any doubt about the substantial accuracy of the quotations from Mr. Masson.

21. I have never harbored any ill will or hatred toward Mr. Masson. I did not write the article and the book with feelings of hatred, ill will or malice, or with any desire to oppress him. I have no ties whatever to the psychoanalytic establishment – in fact I am someone whose writings have displeased large numbers of psychoanalysts – and I certainly had no "vested interest in discrediting Masson and his views," as Mr. Masson alleges in the complaint. Neither, however, had I any interest in serving as a publicity agent for Mr. Masson's forthcoming book, "The Assault on Truth." My intention in writing "Trouble in the Archives" was neither to promulgate Mr. Masson's views on the seduction theory, nor my own views on his views, but rather to chronicle an extraordinary piece of psychoanalytic social history revolving around Mr. Masson's entrance into and exit from organized psychoanalysis. Two other persons, Dr. K.R. Eissler and Peter Swales, played prominent roles in the history I trace.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26 day of March, 1987, at New York, New York.

/s/ Janet Malcolm
JANET MALCOLM

CHARLES O. MORGAN, JR.
450 Sansome Street
Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037

Attorney for Plaintiff
Jeffrey Moussaieff Masson

[Stamped: ORIGINAL FILED APR 24 1987]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, v. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	No. 84 7548 EFL DECLARATION OF JEFFREY M. MASSON IN OPPOSITION TO SUMMARY JUDGMENT Date: May 22, 1987 Time: 10:00 a.m. Place: Courtroom 4

1) I, Jeffrey Moussaieff Masson, am the subject of the two-part article "Trouble in the Archives" which appeared in *The New Yorker* on December 5 and 12, 1983, and the book "In the Freud Archives" which was published by Knopf in 1984. I have full knowledge of all facts set forth in this declaration, and if called upon as a witness, could competently testify thereto.

2) I was a full professor of Sanskrit & Indian Studies at the University of Toronto from 1975 to 1980. From 1970 to 1978 I did psychoanalytic training and graduated as a full-fledged psychoanalyst in 1978. In 1980 I accepted a

post as Projects Director of the Sigmund Freud Archives. I was fired from this position in 1981 because of a disagreement over the question of the sexual abuse of children. During my tenure with the Archives I found material relating to Sigmund Freud's abandonment of his original theory, that children really were molested much more frequently than had been supposed. I found that much of this material had been suppressed by Anna Freud and other members of the psychoanalytic establishment. I talked about the significance of this historical material to a reporter from the New York Times and a two-part article was published concerning the reality of child-abuse and my views. It was this article that led to my being fired from the Archives. The New York Times also reported my firing.

3) Janet Malcolm, a staff writer for *The New Yorker* called me in October of 1982 and asked me if I would be willing to be interviewed for an article about the controversy surrounding my views. I agreed to be interviewed, and Malcolm came to Berkeley in November, 1982 for the purpose of these interviews.

4) When I first met with Malcolm in the lobby of the Claremont Hotel in Berkeley, she asked me if she could tape-record the interviews. She explained that this would be to my advantage, since it would mean there would be no misquotations. I agreed. At several points throughout our interviews, I told her I was concerned that she quote me accurately. She said that she had it all on tape, and I was not to worry since all quotations would be verbatim.

5) Malcolm was very friendly with me and my family during the week she was in Berkeley, and consequently

invited the woman I lived with, Denise Cammell and me to stay with her and her husband, Gardiner Botsford, in their home in New York. In May, 1983, when I was visiting New York to work with my editor at Farrar, Straus & Giroux, and to attend a sales-conference for my forthcoming book "The Assault on Truth: Freud's Suppression of the Seduction Theory." Denise and I stayed for four days with Janet Malcolm and her husband. It was a social visit. Malcolm arranged a party with various psychoanalysts she knew for the first evening, and tape-recorded that meeting as she thought it might be interesting to preserve the disagreements. In fact, however, nothing from that tape-recorded meeting was used in her book. One of the reasons Malcolm said she wished to meet with me in May was for her to acquire a better grasp of the work I was preparing on Freud's letters to Fliess. (I subsequently published the results of that work with Harvard University Press: "The Complete Letters of Sigmund Freud to Wilhelm Fliess, 1887-1904." Edited and translated by Jeffrey M. Masson. Cambridge: The Belknap Press of Harvard University Press, 1985). Malcolm, as the tapes confirm, asked me to bring along the manuscript I was working on so that we could talk about it. We did this. The first evening I was there, Malcolm showed me a new book, published by Dr. K.R. Eissler, the head of the Freud Archives. Naturally I was very interested in the book, and spent the night reading it. The next morning, I was very disturbed by the content of the book, and went down early to breakfast. Malcolm was there, and she and I talked about the book for nearly an hour before Denise appeared. Denise asked us what the excitement was

about, and I explained that I thought the book was terrible, and that Malcolm could not understand why I would care. This is confirmed by Denise Cammell's deposition, my deposition, Malcolm's deposition, and a letter I subsequently wrote to Malcolm about the incident (Exhibit 1). Apart from working on the letters one afternoon, this was the only occasion Malcolm and I were alone. At all other times Denise Cammell was present, and on many occasions Malcolm's husband, Gardiner Botsford, was there as well. Malcolm asked Denise and me to come with her to the offices of *The New Yorker* magazine to meet some of the staff. We did this, and I remember in particular being introduced to the fact-checking department. At the time Malcolm said to me and Denise that I would be spending a lot of time with these people going over the article. We had one dinner with her daughter, another dinner with her husband. Most of the time, however, I was busy working at my publishers. There was no time when Malcolm and I discussed any of the matters written about in Defendant's book. Once she took me to her work room and showed me that she was well into the writing of the book, but said she did not want me to see what she had written. She invited Robert Gottlieb, the president of Knopf, and his family over to meet us and we talked, then, briefly about psychoanalysis and her work. But the visit was primarily a social one. Malcolm never took notes. She wanted to tape the meeting with the analysts, but there was no occasion when she said anything about her tape-recorder being broken. She never told me that anything we talked about would be used in her book, and indeed, in her book, she does not mention this New York visit at all. I never saw her take notes, nor did she ask me

any questions about the material for her book. On the contrary, she told me that she was in the middle of writing it, had nearly finished, and did not want to talk about it. She was very friendly and asked if she could stay with us when she came out to Berkeley later that year. We agreed.

6) Malcolm repeatedly assured me that the quotations ascribed to me would be absolutely accurate, verbatim quotations, since they would come directly from her tapes. There was no need, therefore, for the fact-checkers to read the quotations back to me, since there was a perfect record of them. However, all facts, she said, would be checked very carefully by the famed fact-checker department of *the New Yorker*, and I would be spending a good deal of time on this with them.

7) When Nancy Franklin from the fact-checking department phoned me one day and began checking facts that clearly came from conversations with me, I became alarmed at the number of errors. For example, Franklin asked me if it was correct that I had gotten my ex-wife, Terri, interested in psychoanalysis. No, I explained. Terri was in analysis when I met her. I wondered how such an error could occur, since I had carefully explained this to Malcolm. She also asked if Terri was Polish, and I said she was not, she was a Jew from Poland, and wanted this distinction made very carefully, since as a child she had been in the Warsaw Ghetto and had suffered from the anti-Semitism of the Poles. She did not want to be mistaken for a Pole. I explained to Franklin that this error was completely incomprehensible to me. Then she asked me if my father was from Bessarabia, and I said that I had never even heard of Bessarabia, that my father was from

Boukhara. At this point I became alarmed at the accuracy of the quotations being ascribed to me. I realized there were errors, serious errors, and I told Nancy Franklin of my concern. I asked her if it would be possible for her to read back all the quotations ascribed to me, since we were finding so many errors in the few passages she asked me about. She said this was not possible, but that I was not to worry, there were tape-recordings of all the conversations, and they would be verbatim and accurate. She then asked me if it was true that Eissler returned my letters unopened. I said that was totally untrue. I was now quite upset, and asked how these falsehoods could appear in Malcolm's writing, if everything was on tape. We argued over this, and I said that I insisted on having the quotations checked with me. I told her I was now certain that there were many innaccuracies [sic] and that it was absolutely necessary to verify them. I asked her to speak with Malcolm and tell her of my concern and get back to me. She said she would. I never heard from her again. If we look at the galleys of the fact-checker, we see that all of the corrections were made. But none of them, in fact, were incorporated into the article by Malcolm. (In the book, as opposed to the articles, one of the changes was made. In her article Malcolm had written about Eissler: "whose letters he now returns unread" whereas in the book she has changed it to "whose letters he no longer answers.") In her deposition Nancy Franklin testified that she changed the comments about my having gotten Terri interested in analysis to: "I got her interested in writing about psychoanalysis." In her galley, the change was made, and next to it is a query: "Where did this come

from?" But in the articles and book, the falsity remains (Exhibits 2, 3, 4, 5).

8) Paragraph 14 (b) of Plaintiff's Fourth Amended Complaint deals with my middle names. In the book on page 36, Malcolm quotes me as saying "I decide to change my middle name to Moussaieff – it sounded better." She has me say this to her in a restaurant, in Berkeley. I never said this to Malcolm, either in Berkeley, or at any other time during our acquaintance. It is not true that this was the reason I changed my name. When Malcolm called me on the telephone to discuss the reason for the name-change I explained to her that Moussaieff had been the family name for centuries until my Grandfather, afraid of anti-Semitism in France, changed it to Masson. As part of my psychoanalysis, I wanted to get back to my roots and I also did not wish to disguise the fact that I was Jewish, and so I changed my last name back to Moussaieff, the original family name. But my wife, Terri, convinced me that it would be better as my middle name, since it was very difficult to spell and pronounce, and the same purpose would be achieved. Malcolm and I had discussed the matter before the telephone conversation, but she said she wanted to make certain she got the story straight, and so called me about it. She knew all the facts, but presented none of them to her readers.

9) Paragraph 14 (g) of Plaintiff's Fourth Amended Complaint refers to a conversation that Malcolm claimed took place over the telephone, a few days after she left Berkeley (p. 162):

> A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux had taken *The*

> *Assault on Truth*. "Wait till it reaches the best-seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis.

No such conversation ever took place. There are no notes or tapes of such a conversation. Now Malcolm claims that I told her these things in New York during my visit there in May, 1983. This is completely false. I never said this in New York, or at any other time, and Malcolm knows that the entire conversation is a fabrication. She knows it because I told her, over and over, that analysts would not accept my book or have a good word to say about it. In her defense, Malcolm says that one of the sentences that she added to this spurious conversation is to be found on tape: "Analysis stands or falls with me now." That is correct (it is from tape 8, p. 51, Exhibit 6), but note that Malcolm has completely distorted both the context and the remark itself, by not giving it in full. Here is what I actually said:

> "Yeah, but I've become, for better or for worse, analysis stands or falls with me now."
>
> Malcolm: "Well, that's a very grandiose thing to say."

> Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered."

This conversation took place in November, 1982, in Berkeley. The conversation, in fact, was about Defendants' book, not my book (I am talking about how Malcolm can make me appear and why what I have been doing is of any importance). So Malcolm, quite apart from not letting the reader know that I qualified and explained my statement has taken one sentence from a real tape and added it to a discussion she claims took place in New York on a different occasion some seven months later. In her original manuscript, Malcolm wrote the passage without including this sentence (Exhibit 7); it was added later by pencil in the margin of a galley, apparently as an afterthought (Exhibit 8). In her handwritten notebook (vol. 3) Malcolm has a page where she has a note of me saying:

> "And when I come along and say, wait a minute, here are all these letters, they are just embarrassed out of their mind. I assure you, most of the reviews are going to settle on my personality rather than on the material." (Exhibit 9)

So Malcolm had, in her own handwriting, proof that the quote she ascribes to me could not be accurate. At no time during our acquaintance did I ever express any of the sentiments that Malcolm ascribes to me in that passage. I never told her that I expected analysts to like my book and call me a great scholar, I never told her that they would try to buy me, I never told her there was no refutation possible of my book, and so on. The whole passage is completely in contradiction to what I believe and what I told Malcolm over and over in our taped conversations, as is clear from reading the transcripts of those tapes. The passage is a complete fabrication.

10) Paragraph 14 (h) of Plaintiff's Fourth Amended Complaint charges Defendants with misquoting me by having me say: "I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public." I never said such a thing about myself, and I am not aware of anyone else saying this about me either. I have stated on many occasions that my intellect is not for sale. As the tapes demonstrate, I told Malcolm on many occasions that I felt I could not do differently than I had done, I could not remain silent about what I consider a great injustice. Malcolm kept asking why I jeopardized my career, why I spoke out on issues that I knew would not be acceptable to orthodox Freudians, and I stated to her over and over that I had no choice, that I believed, deeply, in the things I was saying, and asked her how I could pretend that I did not? I asked her how I could remain silent while I felt I had learned about a terrible but significant secret in the history of psychoanalysis? I said it went against my character. I told Malcolm over and over that I was *not* somebody who would simply try to please his elders or his superiors merely in order to advance his own career. I said that went against everything I believed, everything I stood for. Malcolm knew this. That was the main point of our discussions. I never made this statement to Malcolm in New York or at any other time. Malcolm claims in the book that I said this to her in Berkeley, while we were having lunch at Chez Panisse. This is a false [sic]. She later claimed that it was taped, since this entire lunch was taped. It is not on the tape. Then she said I told it to her in New York. This is false too.

11) Paragraph 14 (i) of plaintiff's Fourth Amended Complaint charges Defendants with inventing several passages about the Schreber case. My complaint is that although I told Malcolm several times that Niederland made the initial discoveries about Schreber, and I had simply gone a step beyond him, she does not say this in the book. On the contrary, she states on p. 149 of the book: "It was the same thing with my discovery about the Schreber case. That was even more appalling." She does not mention Niederland at all in that context. I never claimed to make this discovery which, as is commonly known in the field, was made by Niederland, but the statement implies I am falsely making that claim. I never told her those two sentences at all. Malcolm has simply invented them. In the actual tape (2, p. 47) which Malcolm said she used, I say very clearly: "You know, it's interesting because that comes up in the Schreber case. That it was Niederland, this New York analyst who discovered for the first time . . . " (See Morgan Decl. Exhibit 26). Had Defendants reproduced *this* statement, their reader would have been given a fair account. But Defendants omit this. Astonishingly, in her Declaration at p. 10, Malcolm declares: "In the book Masson is reported as acknowledging, but challenging, Niederland's position." But that is simply not true. That is my complaint, that the book does *not* show me acknowledging Niederland's priority. Defendants have transposed what I really say in the tapes with what Malcolm reports me as saying in the book. In the tape (2, p. 47) I do in fact say: "Now what I did, I went a step beyond Niederland but it was important." Malcolm, contrary to what she claims, does *not* report this in the book. Moreover, Malcolm also has me

say that what Freud did with respect to Schreber was an act of "moral cowardice." I never said any such thing. Malcolm, in her defense, claims that *on another occasion* I said that what Freud did to *Ferenczi* could be seen as a moral failure. That is perfectly true, but the context is entirely different, and I did not use "moral failure" in the sense of "moral cowardice," nor did I ever imply Freud was guilty of "moral cowardice" in general. Then Defendants quote me as saying: "There aren't too many interpretations possible of my discovery," Masson said grimly." [sic] But I never said this, grimly or not. Malcolm, by her own admission, has taken a statement from a completely different context, namely the many passages that have been omitted from the published Freud/Fliess letters, and altered the ending, and then tacked it on here. What I actually said, in a discussion about child abuse on tape 22, p. 18 is:

> "But it, yeah, but I don't think there are too many interpretations possible of this kind of material. You know it's just overwhelming the amount of, of information that's been suppressed and so on. I mean it's clear to me that Anna Freud and Ernst Kris just wouldn't allow Freud to say what he wanted to say." (see Morgan Decl. Exhibit 27).

As we can see, Malcolm has simply taken over one of these sentences "I don't think there are too many interpretations possible of this kind of material" and changed it to "there aren't too many interpretations possible of my discovery" and put it in a wholly different context. Moreover, it is in the context of the Freud/Fliess material, (tape 22, p. 18), that I go on to say that Eissler would have admitted that Anna Freud and Ernst Kris "just wouldn't

allow Freud to say what he wanted to say." Malcolm has taken this statement and grafted it onto the discussion about Schreber, where she has me say: "I think Eissler would have admitted I was right." But in that actual discussion, the tape (2, p. 29) reveals that what I said was precisely the opposite: "What will Eissler do with it? What will he say in excuse? Cause he will find an excuse. He'll say, "It's perfectly normal that Freud didn't mention it." Malcolm even says to me at that point on the tape: "Well that would be interesting: what reason he would give." (Morgan, Decl. Exhibit 26). So Malcolm knew that I claimed the opposite of what was printed. Moreover, in her notebook, she has this passage written out, and in bold writing, in the margin, she writes: "He [Eissler] will find an excuse." (Exhibit 10)

12) Paragraph 14 (j) of the Fourth Amended Complaint charges Defendants with falsely quoting me as having admitted "I don't know why I put in," in reference to the last paragraph of a paper I wrote. This paragraph also charges Defendants with describing me as "silent" about the reasons I changed my mind about Freud. But in the book (p. 53) Malcolm claims that I was on the telephone and that when I hung up she told me about her impressions of the paper I had written earlier and asked me why I had changed my views. She then said that I sidestepped her question and told her "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in." But this is completely false. I never said that to Malcolm. In fact, during the actual conversation that Malcolm is referring to (which is recorded) I was not on the phone, she did not ask me a question, and I did not

answer her with the quotes she ascribes to me. (See Morgan Decl. Para. 6) Indeed, this question of the last paragraph came up frequently in our conversations, because it was quoted twice in the *New York Times*, and was the reason Eissler gave for firing me. Malcolm knew it was critical. So when she asked me, in reality, why I said it, I told her because I really believed it. In fact, I repeated this six times in the very conversation Malcolm cites: "I thought that it was, was true." to [sic] which Malcolm answered: "Yeah, yeah, I see." I then go on to say: "I really believe it . . . I must say one thing that I really believe. . . . I really do believe psychoanalysis is sterile . . . I believe that one . . . that's what I believe." I did state that the *wording* was possibly hurtful, and that it could be expressed better, but that I believed the content. Also, I had stated to Malcolm several times that I had spent a great deal of time on that last paragraph, agonizing over it. Yet she reports me as saying that I "tacked it on at the last minute" (something I never said) which makes me seem as if I don't know what I'm doing. Since, as Malcolm admits, the remark had been widely publicized, I believe a reader learning from Malcolm, that I had tacked it on at the last minute" and "didn't know why I had put it in" would reasonably conclude that I was an irresponsible and untrustworthy fool.

As for my being "silent" about my reasons for changing my mind about Freud (her book, p. 58) this is absurd, as Malcolm, in her deposition acknowledges. I told her over and over precisely why I changed my views, and I understood that was the whole point of her coming to Berkeley to interview me. Now she claims that by the word

"silent" she is merely expressing her opinion: (Mal. Depo., p. 312):

> "Let me put it this way. I never said, "Jeff, what has brought on your sudden virulent anti-Freudianism," as far as I can remember. Maybe you can find it in the testimony and I am mistaken. I am talking about my state of mind here and not Mr. Masson's." (Exhibit 11)

13) Paragraph 14 (k) of Plaintiff's Fourth Amended Complaint charges that Defendants invented the phrase "Denise worries too much" (among others). No such conversion took place at lunch. It is true that Malcolm's notes contain some of Denise's questions, and I am prepared to accept that anything in Malcolm's handwritten notes are genuine (indeed, our case rests on the fact that Malcolm took perfectly good notes, but did not stick to them when writing her piece – we have not challenged a single passage from her handwritten notes or from the tape-recorded conversations). But I never said "Denise worries too much." This is completely out of character. I would never make light of Denise's deepest concern, and in Malcolm's notes, Denise is stating her legitimate concern for the feelings of Dr. Eissler and Dr. Gardiner. I told Malcolm the entire story about Eissler before I told it in such detail to Denise. So Denise was hearing for the first time much of this material. It is only natural that she should be concerned. Needless to say, I expressed in some depth to Denise precisely why I did what I felt I had to do. I did not feel I was betraying a friendship. On the contrary, as I often said to Malcolm and to Denise and to others, I felt that Eissler had betrayed me, by so easily giving in to the psychoanalytic establishment when he fired me, instead of standing up for my right to express

what I saw as the truth, even if he disagreed with me (as he did). I felt very badly treated by Dr. Eissler. But what Malcolm quotes is a fiction. She has no notes to back it up. Moreover, at Frits Staal's house, when the topic came up, I did not respond the way Malcolm has me respond. This is clear from the transcript of that conversation, as well as from Malcolm's notes. What, in fact, I told Denise, in the real conversation, satisfied her, and she said: "That I feel much better about, that I can deal with." The conversation with my daughter was completely invented. This is proved by the galleys for Nov. 7, where the statement "I miss Hanuman" is placed in a different location. (Exhibit 12) In the final version, however, this passage is placed after Denise asks about betrayal. Both cannot be true.

14) In a conversation with Janet Malcolm on the telephone in 1983 when we were discussing her getting Eissler to agree to talk, I offered to give both Eissler and the New Yorker a letter stating that I would not sue either party for any statement that Eissler made about me in order that Eissler could feel free to discuss me with Malcolm.

15) When I told Malcolm that my firing by the Freud Archives had made me unemployable as a teacher, analyst, or grant recipient, I was referring only to such employment in the field of psychoanalysis. Similarly, my lawsuit related to the same claim. At the time, I had no prospects in other fields. But since being fired by the Archives, I took up research into the area of the history of child abuse, violence toward women, the history of psychiatry, and so on, and I would have been well suited to a university position in one of these fields. Malcolm's work

has made this impossible. Who, after all, would give a position of intellectual responsibility to somebody who had called himself "an intellectual gigolo?"

16) In their Statement of Material Facts not in Dispute, Paragraph 8, Defendants have once again distorted conversations with me when they say I was "very keyed up"and "excited" and discussed a book by Dr. Eissler about Victor Tausk's suicide. I was "very keyed up" and "excited" over the book by Dr. Eissler, not about anything else. During the visit to New York, no notes were ever taken in my presence, and there was no conversation in which I made the statements that are referred to in Defendants' Statement of Material Facts not in Dispute, paragraph 9.

17) In Defendants' Statement of Material Facts not in Dispute, paragraph 10, they seek to have me admit to a "conversation" which could well include the statements that I deny having made. I did talk to Janet Malcolm in New York at about the time of a sales conference at which I addressed my publishers [sic] representatives and my publisher did expect my book to do "quite well." I did not, however, make the statements attributed to me on lines 15-19 of paragraph 9 of said statement.

18) Defendants, in claiming that I agree that I am careless of other people's feelings (Statement of Material Facts Not in Dispute, Paragraph 14) are again misquoting a statement of mine. In my deposition, when responding to questions regarding what Professor Daniel H.H. Ingalls had written about me I merely commented that the analysis was "a very fair balanced portrait of my

positive and negative traits." I did not testify that I necessarily agreed with Professor Ingalls' analysis.

19) When I referred to myself, in my law suit against the Sigmund Freud Archives as a "pariah" I was referring to the psychoanalytic community only, not to the intellectual community in general.

20) In her book on page 33 Malcolm quotes me as saying that I would turn Maresfield Gardens (Freud's house) into "a place of sex, women, fun. It would have been like the change in the *Wizard of Oz*, from black-and-white into color." She quotes me as saying this in a restaurant in Berkeley, in November, 1982. I never said this to Malcolm, as the tapes clearly reveal. Now Malcolm contends that I said it in New York in May, 1983 (she has it on her typewritten notes of that alleged conversation). I never said this in New York either. I never said it at any time. My actual words, as found on the tape (9, 23), were: "Oh it's a beautiful house. But it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and – well, that's what it needs, but it is an incredible storehouse." (Exhibit 13) This passage is what Malcolm actually used in her manuscript, but later crossed it out and substituted the passage she had invented.

21) After Malcolm's work appeared, I did some serious research in the field of the history of psychiatry, and attitudes toward child abuse and violence to women. This culminated in a recent book *A Dark Science: Women, Sexuality and Psychiatry in the 19th Century* (New York: Farrar, Straus & Giroux, 1986). On the basis of this research, I

hoped to find a university position again, even if not necessarily at the same level I had been earlier (I had been a full professor, but was now willing to apply as a lecturer). I have written to more than fifty universities around the country seeking a teaching position. I also wrote to many community and junior colleges in the Bay area. I offered to teach full or part time, in a variety of different departments (including women's studies, history, psychology, etc.). I have received nothing but negative replies. I have every reason to believe this is related to Defendants' articles and book (almost all the reviews of my recent books, *A Dark Science* and *The Freud/Fliess Letters*, mention Defendants' book.) I have seen at least fifty articles written about me which are explicitly based on Defendants' pieces. Not a single one has anything good to say. On the contrary, they all apparently felt justified in calling me various names, and saying their judgments were based on words from my own mouth that Malcolm quoted verbatim. Here are some typical examples (a full list is found as my answer to Interrogatory No. 16, in Plaintiff's Answer to Defendants' 1st set of Interrogatories):

> "Malcolm's Masson is a megalomaniac . . . a raving showman more carnival huckster than serious researcher;" "a fool, a charlatan, a madman;" "a devastating portrait of Masson as opportunist and vengeful outcast;" "Malcolm portrays Masson as . . . concerned only with gaining maximum publicity for himself, rather than with scholarship or the establishment of truth;" "Malcolm bitterly attacks Masson's character, personal and professional;" "Masson . . . emerges as a grandiose egotist – mean-spirited, self-serving, full of braggadocio, impossibly arrogant, and, in the end, a self-

> destructive fool. But it is not Janet Malcolm who calls him such; his own words reveal this psychological profile;" "a veritable Iago papered over with charm yet filled with motiveless malignity . . . a predator;" "Malcolm's portrait of Masson is devastating: largely through his own words he emerges as a feverish jumble of vanity, self-destruction, childishness and ruthlessness;" "vindictive, narcissistic;" "an unstable publicity seeker;" "impulsive, grasping . . . restless and feckless . . . remarkably free of a Freudian superego;" "a scoundrel of sort . . . narcissistic adventurer . . . manic delusions;: "an apparent opportunist if ever there was one;" "a startling grandiosity and a readiness to distort and to malign in his own interest without regard to the facts . . . a psychopathic personality;" and so on. These statements have caused Masson to be virtually unemployable by any serious organization.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 24th day of April, 1987.

/s/ J.M. Masson
J.M. Masson

COOPER, WHITE & COOPER
CHARLES W. KENADY
NEIL L. SHAPIRO
KARL OLSON
101 California Street, 16th Floor
San Francisco, California 94111
Telephone: (415) 433-1900

Attorneys for Defendants
JANET MALCOLM, THE NEW YORKER MAGAZINE, INC., and ALFRED A. KNOPF, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, v. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	No. 84 7548 EFL SUPPLEMENTAL DECLARATION OF JANET MALCOLM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Date: May 22, 1987 Time: 10:00 a.m. Place: Courtroom 4

1. I, Janet Malcolm, am the author of the two-part article "Trouble in the Archives" which appeared in *The New Yorker Magazine* on December 5 and 12, 1983, and the book, "In the Freud Archives" which was published by Knopf in 1984. I make this declaration of personal knowledge and if called as a witness I could and would testify competently to the matters stated herein.

2. Plaintiff claims that in a letter to the editor of the New York Times Book Review I stated that everything in the articles and book was on tape. This is not so. In the letter (Exhibit 16 to Charles Morgan's declaration in

Opposition to Motion for Summary Judgment) I answered Mr. Masson's letter to the same publication which stated that my portrait of him "presupposes a familiarity far greater than could possibly have been acquired in the few short hours Miss Malcolm and I spent together." I responded that the portrait is based on more than 40 hours of tape-recorded conversations with Mr. Masson which began in November 1982 and continued over the next eight months. I concluded, "Everything I do quote him as saying was said by him, almost word for word. (The "almost" refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversations with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare." Everything I said in that letter is true: (1) the book is primarily based on the tapes; (2) Mr. Masson did say everything I quoted him as saying; and (3) I had 40 or 50 hours of tapes with Mr. Masson, not a "few short hours" as Mr. Masson stated. I did not say that *everything* in the book was on the tapes. I was simply stating that there was substance to the quotations, and that most (indeed, at least 95 percent) of the quotations attributed to Mr. Masson came from the tapes.

3. I never told anyone, including Mr. Shawn, that *all* of the quotations from Mr. Masson were on tape. In point of fact, however, I did not distinguish between passages on tape and passages which were not on tape. Both the hand-written notes which I took when Mr. Masson talked to me in untaped conversations and the transcriptions I took from the tapes ended up in typewritten notes which I used when I began writing the articles. Since I was then using solely the typewritten notes, I did not differentiate

between things Mr. Masson had told me on tape and comments he made in our untaped conversations.

4. Attached as Exhibit A hereto are true and correct copies of various pages (pages 36-38, 53-56, and 148) of the book *In the Freud Archives*, which I wrote and which is the subject of this litigation.

5. Attached [sic] as Exhibit B are true and correct copies of pages from an accurate transcription of my deposition taken on December 8-10, 1986. These are pages 55-57, 64-65 and 165-66 from December 8, pages 311-313 from December 9, and pages 275, 295-98, and 302-03 from the December 10 deposition. (The Court Reporter inadvertently did not number the pages from the December 10, 1986 deposition sequentially to the December 9 deposition, but rather sequentially to December 8, which is why there is overlapping between the December 9 and 10 page numbers. Although the Court Reporter later corrected his error, Mr. Morgan has used the original, non-sequential page numbers, so for ease of reference I am using those page numbers, too.)

6. Attached as Exhibits C, D, E, F, G, H and I to this supplemental declaration are copies of various pages from the taped interviews between me and Mr. Masson, which for purposes of the present motion I will accept as accurate transcripts of those interviews.

7. Mr. Masson, in his declaration (¶11) states that the quotation, "There aren't too many interpretations possible of my discovery," which is derived from Tape 22, page 18, of the interview transcript tapes, was made in a "completely different context" by my "own admission." I make no such admission. Plaintiff's own declaration

makes it unclear what context he believes the statement was made in: "the many passages that have been omitted from the published Freud/Fliess letters" (Masson's Decl. at page 14), or "a discussion about child abuse." (Masson Decl. at page 15.) Although Mr. Masson claims the statement was about child abuse and was made in a "wholly different context," (Masson Decl. page 15), I believed while writing the piece – and believe now – that his statement at Tape 22, page 18, was applicable to the Schreber case. Moreover, Mr. Masson at another point in our interviews (Tape 1, page 61), in a discussion of child abuse and his theory that child abuse is the cause of mental illness, stated,

> "Because it is always a re– reality, and that produces then all kinds of perverse fantasies. But in order to understand the genesis, I mean, it's like Schreber. Can you understand Schreber unless you know what his father did to him? Freud thought you could and it's not true. Moreover, Freud is lying. I found a letter just last week, an unpublished letter in which he tells Ferenczi, 'Can you imagine? The father was a tyrant.' [There was a] whole story about the father. He knew about the father. But he wouldn't publish it. When he came to write his article he omitted it. And that was not known. And I'm the first person to know that. Now that, I [illegible], blatant – Why would Freud do that?"

Thus, Mr. Masson's statement, "There aren't too many interpretations possible of the materials I discovered" is applicable to the Schreber case. Confronted with the various discussions we had of the Schreber case (*see, e.g.*, Tape 2, pages 47-51, and discussions above) and the discoveries Mr. Masson claimed with regard to it, I wrote a passage that I believed then and still believe now was

accurate. I certainly did not (and do not) believe that the gist of the passage was inaccurate or portrayed Mr. Masson in a false or defamatory light.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in New York, New York, on May 13, 1987.

/s/ Janet Malcolm
Janet Malcolm

In The Freud Archives at page 36

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My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too – a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff – it sounded better. We had moved all through my childhood – from Chicago, where I was born, to L.A. to Arizona to Hawaii and back to L.A., and then to Switzerland – so moving to South America wasn't such a big deal.

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Tape 10 – Side B at 30:6-31:27

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MALCOLM: Well, okay. Next question: Uh, what, what is your real name?

MASSON: Jeffrey Moussaieff Masson.

MALCOLM: But didn't you say there was some other name that you were first born with?

MASSON: Oh, Lloyd. Yeah, I changed my middle name. I didn't like it.

MALCOLM: Uh, so you used to be Jeffrey Lloyd Masson?

MASSON: Right, and then my dad, my dad's family name used to be Moussaieff, so I –

MALCOLM: What was his name when he was born?

MASSON: Uh, Masson, also. But his dad was called Moussaieff. M-o-u-s-s-a-i-e-f-f.

MALCOLM: So when did your dad become Masson?

MASSON: When he was born, he was Masson.

MALCOLM: So his father had already changed –?

MASSON: Yeah, his father changed it.

MALCOLM: – it to Masson?

MASSON: That's right.

MALCOLM: Um-hmm.

MASSON: Cause they were – my, my grandfather lived in France.

MALCOLM: And there he become Masson?

MASSON: That's right.

MALCOLM: I see.

MASSON: Just to hide his Jewishness. I'm sure.

MALCOLM: Um-hmm. And, uh, so that was made in Paris by your father's father? That change?

MASSON: That's right.

MALCOLM: And then you intro – reintroduced Moussaieff?

MASSON: Well, I first took it as my last name, and Terri objected that nobody could pronounce it and nobody knew how to spell it, and it wasn't the name that she knew me by, and so I said "Okay."

MALCOLM: But you wanted to change it, to just remove Masson, didn't you?

MASSON: Yeah, I wanted to get back Moussaieff.

MALCOLM: Yeah, when did you do that, or when did you –?

MASSON: In Toronto, about 1975.

MALCOLM: Um-hmm. Was that to épater the Toronto Institute or –?

MASSON: No, I just liked it. I just don't –

MALCOLM: Yeah.

MASSON: You know, it was sort of part of analysis: a return to the roots, and your family tradition and so on. Uh, but then I agreed with her that it wasn't her name after all, so we changed it to my middle name.

MALCOLM: Okay. And that's, that will be the name you will publish your book under?

MASSON: That's right, yeah.

* * *

Malcolm, Handwritten Notes

* * *

Jeffrey Lloyd Masson originally. Father's father was Moussaieff. His father changed it in France. Became Masson. In '75 he decided to be Moussaieff – Terri talked him out of it – So he changed it to middle name.

* * *

Malcolm, Manuscript

* * *

My father is a gems merchant who doesn't like to stay in any one place too long; we had moved all through my childhood – from Chicago where I was born, to L.A., to Arizona to Hawaii, back to L.A., so moving to South American [sic] wasn't such a big deal.

* * *

Galleys at page 26

* * *

My father is a gem merchant who doesn't like to stay in any one place too long. We had moved all through my childhood – from Chicago, where I was born, to L.A. to Arizona to Hawaii and back to L.A. – so moving to South America wasn't such a big deal.

His father had been a Bessarabian gem merchant, named Moussaieff, who had gone to Paris in the twenties and adopted the name Masson. "My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my

middle name to Moussaieff – it sounded better," he said. (Handwritten in margin)

* * *

Malcolm Deposition at 212:2-22

* * *

Q Right. It it your testimony that somewhere else int [sic] the tapes we are going to hear the statement by Mr. Masson that –

A No.

Q "I changed my name to Moussaieff. It sounded better"?

A No.

Q Would you agree, Mrs. Malcolm, Mr. Masson never said that to you?

MR. KENADY: That is a slightly different question, but answer it if you can.

A I wouldn't agree.

Q It is your testimony, then, at some point in time Mr. Masson said to you, "I changed my name to Moussaieff. It sounded better"?

A. My recollection is that he said – well, my recollection is very much refreshed by what I read here, but that

he said that he changed his name from Lloyd to Moussaieff because he liked it better or it sounded better, or something like that. I don't make the distinction between it sounded better and I liked it better.

* * *

Malcolm Deposition at 214:5-16

* * *

A You are asking me why he liked Moussaieff better than Lloyd?

Q Yes.

A He didn't say exactly why he liked it better than Lloyd, but he said he liked it because it reminded him of his ethnic roots.

Q It identified him with his heritage, didn't it? Isn't that what he said to you?

A I believe it was something like that, yes.

Q Do you equate that with the statement, "It sounds better"?

A Sure.

* * *

Review

(Huntsville Times Review, January 7, 1984)

SIGMUND FREUD:

Did he Kill the Psychoanalysis
That Made Him World Famous?

By John R. Turner

Two issues of *The New Yorker* contain two long articles by Janet Malcolm titled "The Annals of Scholarship," which give readers a peak [sic] inside the arcane world of psychoanalysis. The story they tell of a wild-eyed scholar named Jeffrey Moussaieff Masson (the middle name is sort of a fake) is fascinating for itself, but the inferences they permit about the character of exalted in-groups are even more enthralling.

* * *

In the Freud Archives at pages 37-38

* * *

"Then I met a rather attractive older graduate student, and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, 'Well, it's very nice sleeping with you in your room, but you're the kind of person who should never leave the room – you're just a social embarrassment anywhere else, though you do fine in your own room.' And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough 'in my own room.' They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public. Do you know what Anna Freud once said to me? She said, 'If my father were alive today, he would not become an analyst.' I swear, those were her words. No, wait. This is important. I said that to *her*. I said, 'Miss Freud, I have the feeling that if your father were alive today he would not become an analyst,' and she said, 'You are right.' "

* * *

Tape 7 – Side A at 5:5-25

* * *

MASSON: Right, just before, yeah. And, and that's one of the reasons I moved, I was just, you know, I was just really shocked by this and I didn't know what to

make of it and, I mean I knew, and then I met Wendy and she was even worse, and I thought: Well, at least she's a woman, you know. [laughs] I remember once trying to touch her and she looked at me and she said, "I don't think you're man enough to have an affair with me, young man." And err, you know, sort of trembled and I don't know, I just met this everywhere I went, and then I met this Thornton Wilder's niece, who's a rather attractive older woman, graduate –

MALCOLM: I, oh, no, no, no. I met his sister.

MASSON: Ah ha. And she was rather sexy and I had an affair with her and she once took me to some event, art event, and she was very sorry, and she said, "Well, you know, it's nice sleeping with you in your room but you're the kind of person who should never leave the room." [laughs]

MALCOLM: [laughs]

MASSON: "You're just a social embarrassment anywhere else, but you do fine in your own room." And that, I mean, there was a lot of that at Harvard, you know, there really was.

* * *

Tape 7 – Side A at 14:18-15:28

* * *

MASSON: And I don't think for one minute he's forgotten. I mean, he knows it. He, he's just terribly embarrassed. He doesn't want in any way to be associated with, I guess, you know, for an analyst, it could be dangerous, possibly –

MALCOLM: Yeah, well, you know, you said something which I was just reminded of when you were talking, when you quoted that girl who said she liked sleeping with you but she didn't want to have anything else to do with you, when you said something about how the analysts thought you were, uh, that you were this private asset but a public liability.

MASSON: Yes, yeah, that's true, yeah.

MALCOLM: So, there was that kind of double standard, like between team-mates, you know, you can [???] horse around together in the privacy of your own home but –

MASSON: Janet, can you hold on one-half second. I'm blocking someone's driveway. I must have misparked.

MALCOLM: Sure.

MASSON: It'll just take me a sec.

MALCOLM: Okay.

MASSON: Okay? Or do you want to call right back?

MALCOLM: Uh, I'll hold on. That's okay.

MASSON: Okay, just one sec.

MALCOLM: Sure.

MASSON: Hi. Uh, I guess, you know it's a little bit like the business world or the social world. I mean, it wasn't, it wasn't a scientific world, you know? I don't think think [sic] that people in the sciences would have this same kind of problem, do you?

MALCOLM: I don't, I don't know about the sciences. I mean, one, one, it's probably in every organization world [???] some kind of double standard [???].

MASSON: Yeah, but that, it would be so intimately connected to what you do. I mean, I think if you were a [sic] embarrassment socially, it wouldn't effect your standing as a physicist but I think here, well, it's, it's hard to get one's finger on it, but I think that with something, I mean I think that there really is this thing, I mean, I was just thinking the other day, the very fact that they would call Freud, all these people, still today, The Professor.

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Tape 6 – Side B at 48:7-27

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MASSON: And they complained. Eissler said, "You went to see Bleuler, a European professor of psychiatry, wearing a t-shirt and blue jeans, ahh, does that show judgment, gentlemen?" You see, Bleuler –

MALCOLM: At this meeting he said that?

MASSON: Yeah yeah, "And what was the result?" And I said, I was so pleased because I had a trump card, "The result, Dr. Eissler, is right here in a letter from Bleuler saying he's giving me the letters. Ya."

MALCOLM: [laughs]

MASSON: "Well, that's interesting. Well, you charm everybody. Yes, you charm everybody, it's true. I never said it's not true. You are a charmer. You can charm anybody. You charmed me. You charmed everybody. You

charmed Anna Freud." But with a slight hint that this was a psychopathic quality. I had the charm of the impostor sort of, I mean everybody was thinking: Ah ha, you know, the classic paper of Abraham on the impostor. It's a real Felix Krull character, that's what I was. I had managed to worm my way into the graces of Eissler and Anna Freud and Muriel Gardiner through charm and this had worked on them, and they had like fallen into a spell. I had mesmerized them, and then taken away all these valuable letters and rushed off and published them, to damage and destroy psychoanalysis out of some kind of oedipal or unresolved struggle with my father, cheap.

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Tape 1 at 36:23-37:13

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MASSON: The rumor has gone around that I seduced Anna Freud. Literally.

MALCOLM: Really?

MASSON: Yeah, literally, and that's why – she's eighty-seven – I mean, if you look at her nobody has ever seduced Anna Freud, believe me. But, I mean, it's natural, you know, and they'd all say, "Oh, Masson, he's the darling of the International." Originally in Toronto, and then, "Oh, now he's become the darling of Anna Freud and Eissler." And it's true, but it's only true in so far as, I mean, I am exactly as I am with you, and they like that, and even Anna Freud, she complained endlessly to Muriel Gardiner. She said, "You don't know what it's like having Masson in my house. It's like my dog." She has these, you know, she inherited these dogs from her father,

these Chows, and they're totally unmanageable. She adores them. They race around the garden, they tear up everything, they get into everything. She said, "Masson is just like, uh, uh, Sophie." I think her name was. And I was supposed to inherit them. She asked me if I'd take the dog. She adored him. Lovely dog. But he gets into everything. He's irrepressible.

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Tape 1 at 38:25-39:11

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MASSON: And I suppose the question is "why?" Who would Eissler – somebody in France said, *"Monsieur Masson, si vous etes un lapin,"* – "if you're a rabbit" – *"on n'invite pas un renard,"* – "one doesn't invite a fox." "Now you are a fox. And the analysts are rabbits. Why did they invite you down into their lair?" And it's a good question. I mean, it's not [???] He told me. "You don't know the number of phone calls I would get. Masson, every time you would go anywhere on a trip, I would get an urgent telegram, an urgent phone call: "Leash your maniac Masson. Please. You know, you don't know what you've unleashed on the analytic world. You're sending this man around. He's going through everybody's papers. He's coming up with all kinds of things. He's talking about it. He's irrepressible. This is not good for analysis." And Eissler was adamant. He said, "Nobody will tell me what to do."

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Tape 12 at 25

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MASSON: I can remember, eh, sitting at a dinner party with various so-called important analysts. Well, they are important if you, you know, within that hierarchy here. Various of the training analysts here. And I desperately wanted to be recognized as somebody to be taken into account; this was before anything had happened. And I kept waiting for the phone to ring and somebody important – And sure enough, the phone rang during one of these dinners, and we had a, a, a maid at the time, and she said, "There's a certain Dr. Eissler on the telephone." And everybody looked at one another, and I was so pleased –

STAAL: Yeah, of course.

MASSON: – I could have fainted on the spot.

CAMMELL: Eh-hah.

MASSON: And I said, "Tell him I'm having dinner, I'll call him later." And I would have, sort of clapped my hands with glee. Now that is a totally childish, adolescent reaction.

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Tape 1 – Side B at 46:7-16

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MASSON: Anna Freud told me, "If my father were alive today he wouldn't become an analyst." I swear, those were her exact words. No. Well, this is important. Cause I, I said that to her. I said, "I have, Miss

Freud, I have the feeling that if your father were alive today, he would not become an analyst." And she said, "You are right." And she would never, ever say that in public. And, in effect, when I said that I was fired. Is that right? If she really believes it, and if it's really true, why should one, why should one not be able to say it?

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Tape 5 – Side A and Side B at 32:17-35:20

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Then I met these people, Calef and Weinshel here in San Francisco, and the chemistry started. I thought: Ha, here it is; this is what it's like, and then really it slowly started that I did become taken over by a number of powerful members of the international analytic community. In many people's eyes, very unfairly, not based on objective qualities but based on a certain kind of psychopathic personality charm.

MALCOLM: Who said that?

MASSON: Oh, many people. That's the current rumor: I'm a psychopath.

MALCOLM: I thought that word was out of fashion.

MASSON: Oh, no, analysts use it all the time. Whenever they want to insult anybody, they say, "He's a psychopath." That would has been used more of me, I'm sure –

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[Tape Vol. 5, Side B]

MASSON: – psychoanalysis today.

MALCOLM: But it sounds as if there were people who were, were jealous that you had, that you were young and from the outside and that –

MASSON: Well, of course. And that it was so easy for me. I mean, I've had people say to me, "I have spent my life trying to get one letter of Freud's, and you go there and Anna Freud opens up her bloody desk to you. Why? Why you, you little son-of-a-bitch? What did you do?" And I said, "Well, I don't know." In Chicago that was actually a question from the audience. One of the senior analysts said, "I just want to ask one question. Why you? Who's ever heard of you? We've never heard of you. You're not famous. You haven't written much. You're a nobody. Why should you get all these privileges and we get nothing?"

MALCOLM: How did you answer that?

MASSON: I finally said, "Because I'm smarter than you."

MALCOLM: [laughs]

MASSON: [laughs] Which is true. "And I know more, too, and I've got more guts and I asked. And I mean, there are all kinds of reasons, and I'm actually very good at what I do," and so on and so forth. Now, I don't know if that's true. I don't really know. I, I suppose the real anser [sic] is because Eissler adored me, and Eissler was all-powerful with Anna Freud, and once Anna Freud liked me as well, there was nothing to stop me.

MALCOLM: Well, Eissler probably wouldn't have liked you if you didn't have real capabilities and –

MASSON: More than that. I must answer, I mean, this is in a way a cheap interpretation and lots of people have made it, but I think it's probably true. In some sense I must answer some need in him to do precisely what I am doing, that he would himself never do. He himself must have want – He always said, "You were the man I wanted to be. You know, also, you were the son I never had. But really you, you were the kind of person I would have liked to be." . . .

MASSON: I was the bad boy he always wanted to be, and not only that, I was successful at it, and I had a certain charm and I was not an imposter. I mean, everybody's fascinated by the personality of the impostor. Well, here was somebody with those traits but who wasn't an impostor. You know, if I said: I can read German, I could do it. I said, "I'll learn German in six months." They laughed. But I went out and did it, you know, what I said. I delivered the goods. I said to Eissler, "I'll go there and I'll find a letter from Fliess." He laughed, and I come back with a letter from Fliess. Anything I said I did I would do, and he was very impressed and I'm sure he is sorry now. I'm sure he's thought about it every single day. I mean, I'll bet he's thought, you know: I didn't do the right thing. In some recess of his heart he feels it was a lack of courage. He even said to me, I'm not really sure it's true, "I finally gave in to pressure. It was just too enormous, the pressure to get rid of you, from every side, everywhere, every country, everybody who met you, with the exception of Anna Freud and Muriel Gardiner, everybody else wanted to dump you."

MALCOLM: But you feel that's not true?

MASSON: Yeah, I feel it probably is true. Yeah. Why not? Sure it's true.

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Tape 12 at 15

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MASSON: I couldn't get patients, I couldn't meet people, and I didn't know what to do. And I turned to these people who were supposed to be my friends and helpers and none of them offered anything. I mean they – nothing, literally nothing. Now I was totally available, totally free, I didn't have a practice. I wasn't doing anything, I wanted to meet people. And nobody went out of their way. They felt, in a sense, I was a private asset but a public liability. . . .

They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.

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Tape 12 at 24

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MALCOLM: When they're in analysis, they're in this regressed state, right –

MASSON: That's right.

MALCOLM: – and they go around worshipping the older analysts, and –

MASSON: Yeah.

CAMMELL: Hmm.

MASSON: Yeah, and tell stories about them, all the time –

CAMMELL: And you did it, you, you did it.

MASSON: Suck stories. They're great suckers, and it's a question of who can suck the most.

CAMMELL: You did it too, because you did it for a while, right? You had to go through it?

MASSON: Oh God, did I go through it. I mean, I remember Shengold telling me: "Imagine my amazement, Jeff, one day the phone rings and I pick it up and I hear 'Kurt Eissler here.' I nearly fell off my chair, I nearly collapsed. Kurt Eissler calling me, Leonard Shengold, what do you make of that? I was trembling as I picked up the phone." I mean now that is an absurd notion.

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Tape 2 at 10:3-9

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MASSON: I was a very promiscuous person. Sexually. Until quite recently, I mean, all over the world. That was another thing that Eissler, Eissler knew about it and didn't mind my always bringing mistresses over to see him. And he loved it. "Ah," he said, "who are you bringing now?" But he didn't, you know, he got lots of calls, "What is this guy doing here; he's coming in with some woman?"

* * *

Tape 12 at 12

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CAMMELL: Yeah, maybe people, maybe these people really, I don't know, you *are* charming, maybe they really –

MASSON: Fell in love? That's what somebody said about Eissler, that he was in love – that's what Furst said. Furst said to me, he said he behaved like a jilted lover.

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Tape 12 at 13

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MASSON: Well it's true that most of these people don't in fact have close friends. It's hard. And it's very hard I think to find a close friend who shares your interest and shares your point of view, and your way of looking at the world and Eissler and I, and Vic Calef and I, certainly saw the analytic world in the same way. You know, all I would have to do is mention Mahler's name and they'd both gag, or you know, one could amuse oneself for hours mentioning all the famous writers in psychoanalysis who were poor, bad, junky, and we would talk about it and why. I mean, we never had a disagreement. And if I admired anybody they would be sure to admire them.

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Tape 5 – Side B at 35:24-36:3

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MASSON: Yeah. He (Eissler) could do anything. I think in the end he just got too frightened. It's like the Sorcerer's Apprentice, you know, he had unleashed something and he couldn't stop it. What would I find next? And if he could be certain that what I found would stay with me, then that would have been fine, and I think that's where he went wrong, that's what he expected me to do. It would be family. He and I would talk about anything, but we would never go outside and talk about it.

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Tape 5 – Side B at 37:1-3

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MASSON: Yes, definitely. I saw things that he never saw, but I wasn't willing to shut up about it. If I had, everything would have been fine.

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Tape 20 – Side A at 7:4-8:19

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MALCOLM: –that maybe it would be good to play it out with, with a, with a woman analyst.

MASSON: Oh, I agree –

MALCOLM: And in the –

MASSON: But it would have been, but I don't –

MALCOLM: – way, to fall in love with your analyst as one does with the one of the opposite sex –

MASSON: Right.

MALCOLM: – and then see what happens.

MASSON: Oh but it would have been absolutely devastating for me, I mean, I would have put such effort into seducing her that –

MALCOLM: Yes, you would have, but if she was, if she was good, she would not have gone to bed with you and that might have been something that you would have found something interesting in, no?

MASSON: Yeah, but imagine the tremendous disappointment there if she had. [laughs] I mean in a way, you see, I seduced Schiffer. I didn't: it didn't happen sexually, but –

MALCOLM: Yeah.

MASSON: – it happened emotionally.

MALCOLM: Yeah, yeah.

MASSON: And that was a great disappointment to me. I mean when he calls me now, it just saddens me, you know? When I feel these attempts on his part to get close to me and to use me, and the reason it's so sad is 'cause I realize that, you know, he, he's hungry ultimately. He really wants something from me and that part of the pact of an analysis is you don't want anything from the patient.

MALCOLM: That's right. There should be that – like Zen desirelessness, right?

MASSON: That's right, I mean, it is a sort of monkish kind of thing which is another good reason why I shouldn't do it, you know? I don't like monks. Uh, I also don't believe in them. I don't believe that anybody is a successful monk.

MALCOLM: But you should probably meet somebody you can't seduce, no? In –

MASSON: That, that would be nice. [laughs]

MALCOLM: [laughs] It would probably be a very interesting experience for you.

MASSON: I'm sure it would be.

MALCOLM: But you feel very pessimistic about that, right?

MASSON: Yes.

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Tape 20 – Side B at 48:26-50:10

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MASSON: And then when I said, "Well, but after all I did get them," he said, "Yeah, because you can charm anybody."

MALCOLM: Yeah, I see. Okay. So –

MASSON: But you see, I mean, on the other, on the other hand, Eissler in this letter that I read you is complaining that everybody, literally just about everybody that ever met me complained.

MALCOLM: And is that true?

MASSON: Yeah, I suspect it is true. But you must remember who these are. These are ali the analysts. And he said, "The exceptions were Muriel Gardiner and Anna Freud," and that's it really.

MALCOLM: Those, those were the three, yeah.

MASSON: Yeah.

MALCOLM: You, your three, three protectors.

MASSON: And people – He excused people like Parin, who were communists, or anybody left-wing. But any normal conventional person was not happy to meet me. And he felt, uh, that I was therefore bringing disgrace on the Archives. And I think he got a lot of this. I think that every time I went to a meeting, people would call Eissler.

MALCOLM: Yeah, yeah.

MASSON: And I think that they were often just puzzled. You know how is it –? Now he did get something of the other side. Uh, and I finally said to him "Well, are these people you respect?" And he said, "No."

MALCOLM: Um-hmm.

MASSON: And I said, "Well then, you should be pleased." He said, "Yes, that's a point. That's a good point."

MALCOLM: Um-hmm.

MASSON: He was very pleased. He said, "Yes, yes, you're right. I should keep that in mind."

MALCOLM: [laughs]

MASSON: And it's true. He would call me up and he'd say. "You know what so-and-so said about you? He says that you're dishonest." And I said, "Well, is so-and-so reliable?" "No, of course not." I said, "So what do you care?" [laughs]

MALCOLM: He's, he's a very artless man in some ways, isn't he?

MASSON: Yeah, he is. I mean he's, like he's very easily taken in.

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Tape 5 – Side B at 36:13-25

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MASSON: Every analyst loves, I mean, you know, the way to get one-up is to use the word "Anna." Nobody calls her Anna, but everybody pretends to. [laughs]

MALCOLM: [laughs]

MASSON: "When I was with Anna," and they were not, of course, I mean, that's that's one-upmanship, to to [sic] say, "I know Kurt Eissler. Kurt and I were talking the other day and he told me – " That kind of thing. They love it. Analysts are the worst name droppers in the world. And ultimately the whole idea is to get close to Freud and to get close to some documents, so it was a very traumatic experience for American analysts to see this young guy running around with thousands of letters sticking out of every pocket.

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Malcolm, Handwritten Notes

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Then I met Thornton Wilder's niece, who was a rather attractive older woman graduate student. And she was rather sexy and I had an affair with her . . . She once took me to some event, an art event, and she was very sorry. And she said, well it's nice sleeping with you in your room, but you're the kind of person who should never leave the room – you're just a social embarrassment anywhere else, but you do fine in your own room.

• • •

Malcolm, Typewritten Notes

Jeff, visit.

He sees E's book on Tausk the world of the paranoid.

You watch when this book hits the best seller list, the analysts will crawl back. They move whichever way the wind blows. They will want me back, they will say Masson is a great scholar, a major analyst, after Freud he's the greatest analyst who ever lived. Suddenly they will be calling, begging, cajoling, please take back what you've said about the profession, our patients are quitting. When I was fired the Los Angeles, San Diego, and Detroit institutes cancelled my appearances to read papers. Believe me, when the book reaches the best seller list, they [sic] say Masson was always our choice for being the major speaker. The dum dums will say its [sic] crazy. But there are not that many of them. They will try a short

smear campaign, then they'll try to buy me, ulimately [sic] they will have to shut up. Judgement [sic] will be passed by history. There is no refutation of this book possible.

It's going to cause a revolution in psychoanalysis. There is not a patient in analysis who will not come holding the book in his bhand [sic] and say, why didn't you tell me this? What the hell is going on? We want an explanation. This man is telling me that there is something profoundly wrong at the core of the proffession [sic]. There is something wrong at the core.

He sees F/fl. letters as a big cover-up.

It was the Prague spring (me, Eissler and AF) and suddenly the Russian tanks moved in. Anna F. was sort of in love with me. She was taken with me. "Isn't it true that I didn't leave out anything important?"

> Every time I went to her house I found more evidence of Freud's dishonesty. He thinks she communicated with E. (re firing)

Jeff, visit 2

re Swales:

AF said not to send Swales F/Fl letters. Or there would be no project. She didn't give Shur permission.

Jeff sent tick [sic] out of his own money for Swales to come to Berkeley. Swales ranted on telephone about paper. it's [sic] the worst paper I've ever read. It's stupid, dishonest. Jeff said, then we shouldn't see each other. Swales was very nasty on the telephone.

He didn't return money.

Swales threatened suit. ????

E called and said he was upset by Jeff's behavior, reproached him for offering to show Swales letters. E, strictly speaking, was correct. E said it was *my* place to give permission. It's still a murky area. I'll be more careful in the future, I told E. But you, Dr. E., you sent him to me. (not true!) (see correspondence) E said, you've put me in such an embarrassing position. He hinted that he might fire me. (E told me, he should have then.) Then he apologized.

I think they were waiting for an opportunity to legitimaely [sic] fire me. I had close to seven million dollars worth of letters. If I was dishonest she wouldn't have done it. I was being given the whole psychoanalytical legacy (by Muriel, E, and AF) and all I had to do was continue being honest and forthright and courageous. It was irresistable [sic], and there were no ambiguities. It all meshed. No one could ave [sic] been happier than AF, E, Mg [sic] and me. It was the prague [sic] spring.

It's not something that can be payed [sic] back with money. MG said, I don't blame you.

Jeff visit, 3

If he had become secretary, he would have had the title Director. he [sic] would have made everything available in the year 2,0000 [sic]. at L of C.

The archives would have been in Calif. Then when AF died he would have moved to London immediately. Within 24 hours ship all stuff in the house to L of C.

They didn't suddenly discover something about me they didn't know.

I wouldn't have written the book as the director of the museum.

Eric Ericison [sic]: corrupt narcissit [sic].

That was one of my problems, I didn't like anybody. Lipton, Bernfeld. a [sic] few others. Eissler liked that about me. There was little he liked too. Ididn't [sic] even like my own writings. He and E would stay up all night talking about what writings they didn't like. It was transference love. It was a folie a trois – me and Af [sic] and E. I was a fantasy of AF's. She liked to hear that analysts are such creeps, dolts, etc. I was giving her a good time. I was like an intellectual gigolo. You get your pleasure from him. I was like a very expensive cat – an elegant cat – that was dangerous to let out of the house.

Maresfield G would have been a centre [sic] of scholarship, but it also would have been a place of center of [sic] sex, women, fun. It would have been like the change, in the wizare [sic] of oz, from black and white into color.

Jeff/talk during visit

Shiffer said to him, "I am not going to be dreamed about like that." He stayed up all night reading E's book on tausk [sic]. feels [sic] it is about himself. Is outraged by it. He see [sic] it as the world of the paranoid.

You watch when this book (jeff's) [sic] hits the best seller list, the analysts will crawl back. They move whichever way the wind blows. They will want him back. They'll say, Masson's a great scholar

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Malcolm Deposition at 233:20-235:20

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Q Mrs. Malcolm, showing you Malcolm Exhibit No. 16 for identification, can you identify what that document is?

A It is a typewritten series of pages of notes that I took while Jeff was speaking with me in my house in the spring of '83.

Q The interview that involved the sleeping with the graduate student, that took place while you were out in Berkeley; is that correct?

A Correct.

Q When you say the spring of '83, when are you talking about, what month?

A It doesn't say here, so I don't know. Maybe Jeff would remember which month he was in New York.

Q I'm just asking you what month.

MR. KENADY: Which month in the spring of '83?

THE WITNESS: April, May, something like that.

Q Did you write all four pages at the same time?

A I don't remember.

Q Tell us what you recall as to how you prepared those four pages.

A What I recall – you mean – okay. I recall sitting at a table with Jeff and scribbling on sheets of paper things that he said.

Q Was there anyone else present when you were doing this?

A No.

Q Then what did you do with those scribbles?

A Those I have lost.

Q Are you telling us, then, that you took those scribbles and then you converted those into a typewritten page?

A Correct.

Q When did you convert them into a typewritten page?

A Shortly thereafter, shortly after the visit.

Q Did you write all four pages at the same time?

A That I just don't remember, but I know I typed this thing at the same time, maybe at the end of April or beginning of May of '83.

Q Exhibit No. 16 has four pages to it?

A Yes.

Q Did you type all four pages at the same time?

A I typed them at the same time, yes.

Q Did you have more than one scrap of paper with scribbling on it?

A I had more than one scrap; I had several scraps.

Q You threw all of those away?

A Yes.

* * *

Malcolm Deposition at 254:19-255:25

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Q Is it your recollection that all Mr. Masson told you was that he was giving Anna Freud a good time?

A Well, if you are asking me about my recollection, then my recollection is that Mr. Masson told me on a great many occasions that both Eissler and Anna Freud were getting a lot of pleasure from being with him.

Q Then you wrote, "I was like an intellectual gigolo." Is it your testimony that is the statement that Mr. Masson made to you in April or May of 1983 in your home?

A Yes.

Q Was anyone else present when that statement was allegedly made?

A No.

Q What did you understand the term "intellectual gigolo" to mean?

A It had to do with giving them pleasure.

Q Is that your understanding of the term?

A I know what the word "gigolo" means.

Q What is your understanding of the word "gigolo"?

A I believe it is – there is a younger person who is having a sexual relationship with an older person.

Q It is basically a form of prostitution, isn't it?

A Yes, I guess; you could call it that. I guess it is sort of selling your sexual favors, something like that. It has a sexual connotation, yes.

Q You decided to put that after the statement by Mr. Masson of a sexual encounter he had had; is that right?

A Right.

Q You felt that fairly represented what Mr. Masson was saying; is that correct?

A I did.

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Malcolm Deposition at 266:2-12

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A Well, I have to say here that I never said Mr. Masson was an intellectual gigolo.

Q I didn't say you said it. I said that supported the quote.

A I can only say that he said the same thing other times.

Q I thought you told me that he only used the words intellectual gigolo one time?

A That's correct. I only remember him saying it here, but I remember other conversations where the substance of what he was saying was the same.

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Malcolm Deposition at 268:3-9

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Q Are you saying those are the statements from which you concluded that Mr. Masson was saying to you that he was an intellectual gigolo for Dr. Eissler?

A I didn't conclude he said it. He did say it.

Q On this one occasion?

A He used that one word on that one occasion, but he used the sense of it many times.

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Malcolm Deposition at 273:4-12

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A It refers to the relationship between him and Dr. Eissler. You raised the question about whether I was referring to Dr. Eissler, as well as to Anna Freud. I am showing you references to Dr. Eissler as this kind of friend of Mr. Masson's, according to his account.

Q Do you regard anything on that page as being a statement by Mr. Masson that is substantially similar to the alleged statement by him that he was an intellectual gigolo?

A It is on that subject, yes.

* * *

Malcolm Deposition at 276:2-277:24

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Q Let's go to the substantially similar statements regarding intellectual gigolo. Are you aware of anything other than what you have pointed out to us on Exhibit No. 7.5?

A There, too, I felt throughout my long interview with Mr. Masson there were many references to his relationship with Anna Freud and Dr. Eissler as people who got an enormous amount of pleasure from being with him and a relationship that this term seemed to characterize.

Q Are you saying now that when Mr. Masson would tell you about his relationship with either Dr. Eissler or Anna Freud that you interpreted it as being – as his being an intellectual gigolo?

A I would say that when he actually used that term it connected very well with all of the other things he had said about the relationship and that it was a good summary of what he had told me before about what their relationship had been like.

Q What you are saying to us, then, is that you then interpreted all of his previous statements as being characteristic of an intellectual gigolo; is that correct?

A That is not right.

Q Did Mr. Masson ever use any language to you other than what you have written down on Exhibit No. 16, wherein he said something similar or your words were substantially similar?

A No. I never would use that expression. I would say that they were substantially true, but substantially similar does not make much sense to me.

Q Forgive me. Those are the quotes that I have written down. I have been wrong in my life. The term "intellectual gigolo" you said was said only one time.

A Correct.

Q You say that Mr. Masson on other occasions used language that you equated with "intellectual gigolo"; is that right?

A Sure.

Q Can you point to us any language of Mr. Masson's that you say is the equivalent of saying "intellectual gigolo"?

A Again, I don't want to waste our time in looking through here, but I have a very clear recollection – recollection of previous conversations about what his relationship with Anna Freud and Eissler had been like when he was in favor with them.

Q Would those be on tape?

A Some of them, I believe, are on tape.

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***In The Freud Archives* at page 149**

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I think Freud was a great and remarkable thinker, but *he wasn't honest*. He was a man who just lost his courage. His entire theory after he abandoned seduction was the product of moral cowardice, because Freud knew that Schreber was in an asylum where they were trying to castrate him, and he never mentions it.

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Tape 2 – Side B at 48:3-28

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MALCOLM: So you've developed a very ambivalent view toward Freud, haven't you?

MASSON: Uh huh! It's more than ambivalent. I think he was a great and remarkable thinker but he was still a, a, a man who just lost his courage.

MALCOLM: Um-hmm.

MASSON: He was a brilliant mind who didn't have the courage to stick with things that he knew were true. I mean, just look at that Schreber thing! He must have known it. When he came to write that, he did not say so. Why? Cause he didn't want to insult a famous psychiatrist like Flechsig. And because he knew it wouldn't be good for his theories. I mean that's all supposition. But I mean, something happened.

MALCOLM: Yeah.

MASSON: It's not honest in the end. You don't write – And it was the first piece ever written on the psychology of homosexuality, the first attempt to unravel the mystery of homosexuality by Freud. It's a brilliant and convincing thesis. And it's dishonest. Cause [sic] he knew that the man was in an asylum where they were trying to castrate him! And he doesn't mention that. Now what, what would you say about somebody like that?

MALCOLM: Yeah.

MASSON: No matter how brilliant they are, how good a thinker, they are not being honest if they omit that fact from their essay. Suppose you had a student who had done that. What would you tell them?

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Tape 17 – Side A at 6:18-21

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MASSON: They wanted something from somebody else and they were simply using her. And Freud didn't have the balls really, that's what it comes down to, to say to her, "You're aboslutely [sic] right."

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Tape 17 – Side A at 9:1-3

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MASSON: – nobody sees Freud as having totally caved in. And I think the tragedy is that he not only caved in there but he caved in everywhere.

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Tape 17 – Side A at 15:24-26

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And he, he really chickened out and I think the whole of psychoanalysis just followed him.

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Tape 17 – Side A at 16:12-13

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MASSON: And he just didn't have th [sic] guts to stick with it.

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***In the Freud Archives* at page 33-34**

"Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.

"When word got around that Eissler had made me his successor, other things started to come my way. I was made a director of the Freud Copyrights. This is the group, made up of Mark Paterson, Masud Khan, Mrs. E. L. Freud, and me – I still haven't been kicked off it, for some reason – that controls the copyright of Freud's writings. My appointment happened through Masud Khan. He's a well-known English analyst. At first, he was very suspicious of me, but when he saw the future – how I was coming in and taking over from Eissler – he wanted to be on good terms. So he invited me to his house and wrapped his arms around me and said, 'My dear boy, you must become a director of the Copyrights.' He's a very handsome man, about six feet seven. His full title is Prince Masud Khan – he's an Indian raja – and he's very fashionable. He used to be married to a Russian prima ballerina. And he's generous – he gave me books and a big picture of himself at our first meeting – and very articulate. He says what he thinks. He's got class and he's fun, and we took to each other right away . . . "

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Malcolm's Typewritten Notes

Maresfield G would have been a centre [sic] of scholarship, but it also would have been a place of center of [sic] sex, women, fun. It would have been like the change, in the wizare [sic] of oz, from black and white into color.

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Tape 9 – Side A at 23:3-11

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MASSON: Oh, it's a beautiful house.

MALCOLM: Yeah.

MASSON: But it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and – Well, that's what it needs, but it is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating.

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Tape 2 – Side A at 10:3-9

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MASSON: I was a very promiscuous person. Sexually. Until quite recently, I mean, all over the world. That was another thing that Eissler, Eissler know about it and didn't mind my always bringing mistresses over to see him. And he loved it. "Ah," he said, "who are you bringing now?" But he didn't, you know, he got lots of calls, "What is this guy doing here: he's coming in with some woman?"

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Tape 9 – Side A at 17:23-18:18

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MASSON: Masud Khan invited me to his house and he said, "My dear boy," putting his arms around me, "You must become Director of Copyright." I said, "Well – " He did that actually and he did it because he liked me and he liked me because I was in well with Eissler and I had, I mean, he saw, you know, the future. I was coming up and I was going to be taking over, and he wanted to be on good terms. He, you know, is very political that way. Gave me a big picture of himself and wrapped his arms around me and gave me books. He's fun and he's

generous, a very handsome man, about six foot, seven inches, looks like a giant. Very articulate and says what he thinks and he's very fashionable. He's married to a prima ballerina, a Russian woman and –

MALCOLM: Makharova.

MASSON: Yes. He's married to her and he's got lots of, he's got class, you know. And he's fun. I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs] –

MALCOLM: [laughs]

MASSON: – going to really, we were going to live it up.

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Tape 13 – Side A at 27:7-21

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MALCOLM: Well, you commented that you slept with a thousand women. I was nearly reminded of that scene in *Don Giovanni*, you know, the Leporello – and Bob –

MASSON: Yeah.

MALCOLM: – I talked to him yesterday. I forget what the context was, but he also used that number –

MASSON: Yeah.

MALCOLM: – of all these women that you've slept with, and I thought, I mean, "Did you really count?"

MASSON: No, but I, I once figured it out in terms of you know, I slept with so many women per week for so many years –

MALCOLM: That, that's a very large number.

MASSON: Close to a thousand, yeah. I mean that's accurate. It is around that. I'll say between seven hundred and thirteen hundred, something like that.

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Tape 5 – Side A at 2:7-3:25

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MALCOLM: Now, how did that begin? How did you first become interested in analysis?

MASSON: Well, I was very neurotic myself and I, my main symptom was total promiscuity, sleeping with every woman I could meet.

MALCOLM: This was as an adolescent or –?

MASSON: As an adolescent. At Harvard. And I went to see –

MALCOLM: You were an undergraduate and graduate student at Harvard?

MASSON: Yeah. And I went to see Erik, Erik Erikson, and asked if I could go into treatment with him, and he said, "No," but he knew somebody very, that he had great respect for, and I went to see this person who was an analyst and I went into therapy. Then I left for

India and then I still had the same problems, so when I got to Toronto, I went into therapy again, and then I decided to go back and really go into analysis five times a week to get to –

MALCOLM: But, by the problem of promiscuity, you would just fall in love with a lot of girls –?

MASSON: No, no, I didn't fall in love. I just screwed a lot of women, like, you know, a different woman, two or three women a week.

MALCOLM: You didn't care about them? You just wanted to, to have the sex?

MASSON: Yeah, I just wanted sex. Lots of it. With lots of different women. And it never seemed to get any better. And it seemed to me that that had something to do with my childhood and that I could find out something about it through analysis, that surely this was not just – I mean, I didn't say to myself: Well, you're just a lovable guy. [laughs] You know, you just love women and women love you, so it's easy. I knew there was something wrong with it, something was preventing me –

MALCOLM: You saw it as an illness?

MASSON: Yeah, I saw it as an illness.

MALCOLM: Just by yourself or did somebody kind of, you know –?

MASSON: Well, a lot of the women would help me. You now, women didn't like that. I'm, I'd sometimes get closer to a woman than just sleeping with them one night. Sometimes I'd be with them for a few weeks or a few months, but I was always looking around for other

women. And they'd say, "Hey, you know, you're sick and I'm in love with you. Why aren't you in love with me?" That kind of thing. And after a while, I realized: Well, you know, I can't say because I'm looking for the right person. I'd met, I don't know, I'd slept with close to a thousand women. I mean, it was time I – [laughs]

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Tape 7 – Side A at 8:2-20

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MASSON: So I went to Harvard. I really think I would have done much better anywhere else.

MALCOLM: Yeah, yeah.

MASSON: It just wasn't for me, you know. It was an awful atmosphere. In a way, I mean it was good for scholarship.

MALCOLM: Yeah.

MASSON: You know, if you really wanted to become a scholar, by God, that's what I wanted more than anything in the world. I wanted to become a scholar. That was just my, I don't know, like some teenager who wants to be a football player.

MALCOLM: Yeah.

MASSON: I just was desperate. And I did. Uh, but it cost me a great deal doing it.

MALCOLM: Yeah, so, so you had a painful experience there?

MASSON: It was a very painful experience. I was quite miserable for a while. But there were always, I

mean, thank God, there were women and I went off to Wellesley and I met lots of women and I screwed around a lot and that helped.

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Tape 7 at 20:3-12

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MASSON: I mean, I've never met an analyst who wasn't dull. If you can name me one that I know, uh, I mean, as a person. I mean, even Shengold, he's dull. You know, you spend, you're not going to go off on vacation and have a great time with Len Shengold. You know, he's overweight and he's not in shape. You know, to find an analyst who [laughs] is just sort of normal and likes to do things, I mean, I couldn't imagine palling around with an analyst. You know, "Let's go pick up some women. Come on, let's –" They wouldn't do that, right?

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Malcolm, Manuscript

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Anna Freud was nice to her, but there was no warmth, and the house was a cheerless place. It was a beautiful house, but it was dark and sombre and dead. Nothing every went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. ~~Sun would have come xxxx pouring in, people would have come, there would have been parties and laughter and fun.~~ [handwritten copy for crossed out area: Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women,

fun. It would have been like the change in "The Wizard of Oz" from black and white into color.]

* * *

Galleys at 23

* * *

It was a beautiful house, but it was dark and sombre and dead. Nothing every went on there. I was the only person who ever come. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in "The Wizard of Oz", from black-and-white into color.

? on tape (Handwritten in margin)

* * *

***In the Freud Archives* at page 162**

A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux had taken *The Assault on Truth*. "Wait till it reaches the best-seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now."

* * *

Malcolm's Typewritten Notes

You watch when this book hits the best-seller list, the analysts will crawl back. They move whichever way the wind blows. They will want me back, they will say Masson is a great scholar, a major analyst, after Freud he's the greatest analyst who ever lived. Suddenly they will be calling, begging, cajoling, please take back what you've said about the profession, our patients are quitting. When I was fired the Los Angeles, San Diego, and Detroit institutes cancelled my appearances to read papers. Believe me, when the book reaches the best seller list, they [sic] say Masson was always our choice for being the major speaker. The dum dums will say its crazy. But there are not that many of them. They will try a short smear

campaign, then they'll try to buy me, ulimately [sic] they will have to shut up. Judgement [sic] will be passed by history. There is no refutation of this book possible.

It's going to cause a revolution in psychoanalysis. There is not a patient in analysis who will not come holding the book in his band [sic] and say, why didn't you tell me this? What the hell is going on? We want an explanation. This man is telling me that there is something profoundly wrong at the core of the proffession [sic]. There is something wrong at the core.

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Tape 7 – Side A at 22:2-25

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MASSON: Yeah, but Janet, they haven't seen my book.

MALCOLM: I see.

MASSON: I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.

MALCOLM: Uh huh. Yeah, but I mean they may still be friendly toward you.

MASSON: No, never. I assure you.

MALCOLM: You think Shengold will, will be unfriendly –?

MASSON: Absolutely, absolutely. They will not, I mean, they may do it very privately. Look at the fact that I was not any longer invited to anything after this.

MALCOLM: Uh huh.

MASSON: I mean, why would that be? I'm the same person, right? And even the opinions I have are identical. Everybody knew the opinions I had and as long as Eissler was behind me and Anna Freud was supporting me, I was invited everywhere.

MALCOLM: Yeah.

MASSON: And loved, even though hated in some way.

MALCOLM: Yeah.

MASSON: And now, nobody. Not a single analyst. I never have any contact now with analysts.

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Tape 8 – Side B at 51:11-27

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MASSON: Yeah but I've become, for better or for worse; analysis stands or falls with me now.

MALCOLM: Well that's a very grandiose thing to say.

MASSON: Yeah, but it's got nothing to do with me. It's got to do with the things I discovered.

MALCOLM: Well, whatever, that's still a [???] thing and, and I'm not there yet.

MASSON: Well, you'll see.

MALCOLM: I can't think in this global way yet. Maybe I will –

MASSON: You will.

MALCOLM: – after I've talked to a few more –

MASSON: Maybe you won't until you've written the article and see the reaction but it will, analysis is either going to face this kind of stuff that I've found, which are historical documents, and change or they're going to deny them and they're going to become [???] destroyed.

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Tape 6 – Side B at 61:4-62:18

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MALCOLM: But Melanie Klein is [???] artist.

MASSON: No, but a lot of analysts have been influenced by her. Thousands of them.

MALCOLM: Most of them in South America, no?

MASSON: Well not just that. Also in America, Los Angeles.

MALCOLM: Yeah.

MASSON: And a lot of what Kernberg – says he's been influenced by her –

MALCOLM: Yeah.

MASSON: Well he's a big influence in American psychoanalysis.

MALCOLM: Well, that's true.

MASSON: Talk to Kernberg. Boy, he won't like my position one little bit, you can be sure. He hates it with a passion. Or Mahler, or any of those people.

MALCOLM: Yeah, yeah.

MASSON: I mean, just – You're going to hear it. Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur [sic] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. It's me alone. Therefore, it's not for me, I mean I'm not –

MALCOLM: Well, I asked Calef [???], does he have patients who have actually really had, were really raped as children?

MASSON: Yeah.

MALCOLM: And what does he do? And he said, "Well, you know, fewer now than he did early in his practice [???] richer –

MASSON: [laughs] Yeah.

MALCOLM: And more middle class patients, which is a classic problem, and he said he certainly doesn't [???] feel sympathy.

MASSON: Yeah, yeah. Well, he's written about that, sure, yeah.

MALCOLM: But you see these people as exceptions, who will accept –

MASSON: Not only as exceptions. I don't think they draw their conclusions. Why then did he hate my paper so much? That's all the paper's about. Why would he say that?

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Tape 12 at 34

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MALCOLM: Well, Freud started it all.

MASSON: He was the first analyst.

CHILD: [???]

STAAL: See, I know, I know very little about Freud –

MASSON: Analysis was started in 1895 and –

STAAL: – and psychoanalysis. I know more –

MASSON: – it died in 1982.

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Tape 1 – Side A at 2:4-28

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MASSON: No, I'm just trying to think of what, you know, because it's been – It's new to me, in a sense, all of this, and it's all, really in the last week, I went to

Europe and suddenly it was like a bomb bursting. *Le Monde*, I never expected *Le Monde* to phone me. And *Spiegel*, I mean they all want to do all of this. And I'm trying to figure out what it is, whether it's – I, I have a feeling there is a real groundswell beginning about the whole of therapy, psychoanalysis, psychiatry, that there's something profoundly wrong and that people sense this and they want something they can, "Ah-hah, here is what it is."

MALCOLM: Um-hmm.

MASSON: So I feel that, you know, my story, I mean it's hard to avoid it. Even at this famous witch trial with the thirteen [laughs] judges and myself, the whole question of Ferenczi came up. And they said, you know, this, "We can't help thinking of Ferenczi; this is what happened to Ferenczi at the end, too. He was paranoid." And I said, "Yes, but look, A: I'm not paranoid, B: Unlike Ferenczi, I'm not sick. I'm not old, I'm not tired, I'm young, I'm a good fighter. If you people want a fight you're going to get one. There're thirteen of you and one of me, that's just about the right odds. Considering how firghtened [sic] all of you are." And I pointed out to them that they had been terrified. Every time Eissler said even the most absurd thing, they would all agree with it.

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Tape 5 at 57:2-6

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MASSON: And I've got to soon sit down and, you know, work ten hours a day on my book because it's everything, everything hangs on that book. I have a

French contract, an Italian and a German. Hopefully, Harvard is going to take the book now and give me some money. If they don't, Farrar, Straus.

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Tape 12 at 30-31

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STAAL: You know what Schopenhauer said, the difference between being young and being old? When you're young, and the telephone rings, you, but he really said it well, *Da Kommt es*, "Now it is coming." And then you are old and the telephone rings, and you say, *da kommt's*, "There it is."

MASSON: That happened even today. I mean, there is a sort of – The phone rang while Denise was there, and I said, "There's my future."

MALCOLM: Uh-huh.

MASSON: And, uh, it was long distance from New York, and he says –

STAAL: Denise your [sic] young [???].

MASSON: – [???] from Farrar Strauss, and, uh, we received your manuscript, we're very interested, we want to publish the book. And I got that certain, heart going, you know?

CAMMELL: But even –

MASSON: And, yeah, when you called –

CAMMELL: – when you –

MASSON: – when you called.

CAMMELL: It was so bizarre, he'd come back from, from um, France the night before and the phone rang and he said, he said something it was just incredible, I mean it was incredible, and there you were on the phone. Really amazing.

MASSON: And I, it's too good, I swear, I had had –

CAMMELL: [Simultaneously] Two calls like that, he said, today, "There's my future," and it was this person –

MASSON: I had the fantasy –

CAMMELL: – with money.

MASSON: – when I was in France, I was mad, when I had an interview with *Le Monde*, which is very prestigious in France, and it will come out on Sunday, "Well, that's fine but it doesn't do me any good, I'm, I'm not there. I wonder why somebody like Janet Malcolm from *The New Yorker* doesn't phone me?"

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Tape 1 – Side B at 39:13-39:20

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These were my three friends. Anna Freud, Muriel Gardiner and Kurt Eissler. Everybody else, like Wallerstein, hated me. Would have done anything to get rid of me. [???] Envious, and you know, they genuinely felt I was a mistake and a nuisance. And a potential danger to psychoanalysis, a really critical danger. They sensed that. And they were right. "This man could single-handedly bring down the whole business."

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Tape 5 – Side B at 58:4-14

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MASSON: Yeah, so I don't have a publisher, and my feeling is if I don't get one, fuck them. I'll let the book come out in Europe and they'll be sorry, you know, it'll create all this storm and a lot of attention, and then they'll come to me and say, "Well, we'll pay you this, that and the other," and then I can pick and choose. At present, if I got ten thousand dollars in advance, I'd be happy. And Arthur fold [sic] me on the phone, "That's chicken feed. Is that all Farrar, Straus is offering you?" I said, "No, they haven't even offered. They just suggested the possibility of ten thousand dollars." He said, "Chicken feed!"

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In the Freud Archives **at page 14**

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"And when my book comes out there is not a patient in analysis who will not go to his analyst with the book in hand and say, 'Why didn't you tell me this? What the hell is going on? I want an explanation. This man is telling me that there is something profoundly wrong at the core of psychoanalysis. Jesus Christ! If this is really true, what am I doing here?' When I was fired from the Archives, Alice Miller, who shares my ideas and therefore can no

longer call herself a Freudian analyst either, was the only person who had the guts to come out for me."

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Tape 21 – Side A at 19:16-27

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MASSON: Uh, and when these, this book comes out, it's, uh, I mean I really feel it spells the beginning of the end of psychoanalysis, and he's definitely going to blame me, as will every other analyst in the world for having done psychoanalysis an irreparable damage. But what they'll say beyond that is still a puzzle to me, how they're going to reinterpret the documents I've found so that it, on the contrary, uh, enhances Freud's image is totally mysterious to me.

MALCOLM: Um-hmm, um-hmm.

MASSON: Undoubtedly they will try that. But I don't think they're going to fool the whole public you know. I think that this book really is, uh, it's the end for them.

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Tape 8 – Side A and Side B at 32:11-34:16

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MASSON: But all those things happen. They happen to lots of patients who are in analysis, and most analysts, all analysts, will by and large say, "It doesn't

matter what happened. All that matters is what the patient feels about what happened," and that is not true. And the reason they say it is because Freud said so and what I'm showing in all my work is that Freud said so for reasons that are not honest, and that's why analysts are so upset by it. Because if I am right, and it's ery [sic] hard to prove that I am not, then they've got to say, "My God, what the hell have I been doing all these years to my patients?" And that's, that's the essence of this business. It's scary for analysts and I assure you that every analyst you talk to is going to be scared. They're not happy. And I don't think it's going to go away. I really don't. I don't think that this whole controversy is just going to disappear.

MALCOLM: No.

MASSON: But, that's what they'd like to say. "This is just another upstart, you know, Masson, like many people, feels that he knows more than Freud. It will cause a stir in the press because of this article in *The New Yorker* for a week or two and then it will die down and then we'll continue in our profession as we always have, searching for the truth." That's not true. It's not going to die down. It's not going to go away, and the reason it's not is because these things are written by Freud, not by me. Freud wrote these letters, I didn't. I just found them and patients are going to say, "What the hell is going on here?" They're already say [sic] it. I know it. I've heard it from analysts close to The American Psycho-Analytic. The office was swamped when all these articles came out.

MALCOLM: Yeah.

MASSON: With people calling saying, "What the hell is going on in analysis? What secrets are you guys keeping?"

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[Tape Vol. 8, Side B]

MASSON: "What secrets are being kept from us? What is going on in analysis?: Patients are asking that. "What, what, what is this about Masson? I mean, is this not true? Tell me why? They're asking those questions and they're worried, and I don't blame them. I would be. If I had been a patient and somebody else had come along with all this information, I would have called him already and said, "Hey, wait a minute. This really effects [sic] me. I'm in analysis. I want to know. How are people responding to this? What's the analytic answer to this? Are they assimilating it? Are they taking it seriously? What are they doing about it?" I'd have been very worried and I think patients will be very worried and they will be worried for a long time to come. And they, the practice is going to diminish. People are going to stop going. I know it.

MALCOLM: Well, people are going to stop going when they stop having problems, and as long as people have problems they're going to go to some kind of therapist or another –

MASSON: Well, that's the problem. They're going to go to people that are a lot worse than analysts and I'm sorry but, you know, that's not my concern. It's like saying, "Well, what happens to all these students who want to do Sanskrit now that you've wrecked the

department?" It's not my problem. It's my problem to find out if something's true or false, corrupt or incorrupt and afterwards, what gets done. It's not my concern. So, I'm sorry that patients will not want to go to analysis. They, you know, if they ask me what I think, I'll tell them, "Well, they're a hell of a lot better off than they are in any other kind of therapy."

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Tape 12 at 16

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MASSON: Oh Yes. Until, but, but then it switched, you see, once Eissler took me over, and I [???] –

CAMMELL: Then they all want you, huh?

MASSON: Then they suddenly, you know, "Our friend Masson." As long as I was within the hierarchy then I became, "Well, you know, we always knew Jeff would do well." "My friend, where have you been, I haven't heard from you in so long" "I understand you're head of the Archives, can you get me this, can you get me that?" And then they, then they start suddenly, "Would you help us with this, would you help, would you send us this, would you send us that?" Then I get thrown out of the Archives, and not a word of greeting any more. Now you cannot call that loyal friendship.

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Tape 8 at 34:27-35:7

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MASSON: And most analysts are going to talk about it, too, with their patients. I know that they already

are. If they say, "This is nonsense," then people are going to react a little bit like the Hartmann story: "Thank you very much. I won't be returning."

MALCOLM: Yeah.

MASSON: It's going to happen and I'm not, I don't care really. I mean, I don't feel, I mean, it's just not as if I have sleepless nights over what I'm going to do to analysis.

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Tape 19 at 41:25-27

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MASSON: Yeah, oh yeah, I mean there's certainly really historical [???] documents that deserve a study. I mean I could write a brilliant article about the tapes of the Archives.

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Tape 19 at 13:2-26

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MASSON: Yeah, I think it really is, but I think you'll be glad that it is because I really feel that this is going to take a historical place, you know. It's, it's not just a, a, a pleasant article about some theme that's captured people's interest. It really is something that's going to be significant cause I'm absolutely convinced. The more I look at this, and like presenting it to somebody like Nancy Miller over the last three days, who came quite fresh and realizing the impact that the story finally has when they've absorbed all the information, I realize it

really is going to affect the practice of psychotherapy. There's no question of it. So that I think that the, the material surrounding it is terribly important and I –

MALCOLM: Um-hmm.

MASSON: – I mean, and she also, Nancy Miller agrees with me that it's not my place to talk about it.

MALCOLM: Yeah.

MASSON: That in the book I'm not going to say anything about myself whatsoever, and what I did or how I found things or who I know or, but it is, it is the, the obvious question. Everybody's gonna want to know: "How did this happen?" And at that point your article will be there –

MALCOLM: Um-hmm.

MASSON: – and that's absolutely perfect. I mean the timing couldn't be better. By the way, the book was sold to Faber & Faber.

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Tape 19 at 4:22-23

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MASSON: Yeah, yeah, well he's, he's (Eissler's) going to have to write a whole library when my book comes out.

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Tape 17 at 53:14-24

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MASSON: I hope not. God, I really want it to come out, I mean not just because it provides, you know, proof of my theory but because it is such an important work.

MALCOLM: Sure but everybody wants it. I mean, I would think all analysts would –

MASSON: All analysts –

MALCOLM: –be interested in this.

MASSON: Well, of course they are. But I think that somebody like Eissler – You should have asked him directly, "Do you want this to appear?" I mean I don't think he does want it to appear.

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Tape 16 at 16:25-28

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MASSON: I know that some people like me enormously, really take to me and then are very loyal to me, and others hate my guts from the beginning. But I didn't entirely understand that I would have such a catalytic effect on analysis.

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Tape 17 at 12:18-13:15

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MASSON: That's right and you know, it's like having one good friend. You know, you need that and

when you suddenly discover you're really alone, like I discovered that night at Eissler's, you know, looking around me and here were thirteen men and two women who had all been around, you know, they'd all done analyses for umpteen years, uh, there was no reason for them not to see what I was saying, and say – a little bit like Furst said afterwards, not at the time but, you know, I expected them all to say right at the time: "Look, Masson, of course you're right; of course these things exist; wonderful that you found them but, you know, this just isn't the way to go about it. We are a profession and we're going to get destroyed if you do this. Now we understand that you have to do it but you should really understand, you can't be part of the Archives," uh, and I would say, "Yeah, I see that." And had Eissler said that to me, "How can I ask you to be running the museum in Anna Freud's house when you yourself are discovering so many unpleasant things about Freud? Of course they're there. Of course they're real. Of course your interpretations are correct. You're a historian but then you shouldn't want to be part of this." And I would say, "Well, you know," I'd say, "Yeah, I guess you're right." He'd say, "The only honorable thing to do, Jeff, is to resign." And I'd say, "Yes, yes, you know, I, I see, you're right. I understand that." But that's not what they did. You know what they had to do was trivialize what I had found, pretend that I was some sort of, uh, narcissistic uh –

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Tape 20 at 18:10-22

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MASSON: – you know, all the qualities I knew he (Eissler) had, he still has. Uh, I was surprised that he showed such cowardice. I mean I was convinced that he would say to these thirteen men: "Fuck you," you know, "I don't care what you think. I've never cared before. I don't care now."

MALCOLM: Yeah, yeah.

MASSON: "And I, I don't expect you to like Masson. Just shut up and do what I tell you." [laughs] You know, sort of thing. I was just amazed at his cowardice and then I was amazed that he didn't have the guts to say to me: "Look, you're a hundred percent right, uh, you haven't done anything wrong, but this is a yucky world and, uh, I have to play by the rules and I'm kicking you out."

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Tape 20 at 27:26-28

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MASSON: And I would go to this Clark Institute of Psychiatry which is now, you know, I consider one of the rat holes of the world.

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Tape 21 at 18:17-22

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MASSON: I mean it really, I mean in a sense there is, I mean I do understand one point, namely that I

was given access to these documents in the belief that I would enhance psychoanalysis. And what I have done is use these documents to destroy psychoanalysis. Now I understand that but I, I don't feel responsible for that.

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Tape 22 – Side B at 17:19-25

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MASSON: Oh yeah, oh yeah, I mean, you know, I really believe this book that I'm writing is not, you know, it's not just an opinion. It is the truth.

MALCOLM: Yeah.

MASSON: I mean that's true. It's historical stuff and you know, sooner or latter it's going to be recognized. I mean cause it's not my opinion.

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Tape 22 – Side B at 18:14-21

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MASSON: It's true. That's that's what he (Eissler) would have said: "Never let it out. It's just between the two of us. We can know this. We're strong enough to digest it. But anybody else, it would collapse – It would be the beginning of the end of psychoanalysis." And the, of course, then the next step would have been to say: "But, Dr. Eissler, surely we don't have the right to hide away information simply because it's going to destroy a profession, if it's the truth?"

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Tape 22 – Side B at 22:21-23:4

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MASSON: And, uh, I mean it's sad, you know. I can't really believe that there's anybody who will appreciate this book I've just written more than Eissler.

MALCOLM: Yeah, yeah.

MASSON: In some way. I mean he'll never admit it. He [sic] gonna, you know, he'll kill himself when he reads it. It's gonna destroy him. But I mean, he will, he will be utterly fascinated by it.

MALCOLM: Yeah.

MASSON: 'Cause it's exactly the kind of scholarship he admires.

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Tape 19 at 47:18-20

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MASSON: But I – She's not terribly, you know, not unusually bright and she doesn't know much. Well, as you'll discover, most analysts don't know really anything about the history.

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Tape 19 at 36:11-15

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MASSON: But I don't think that's entirely honest 'cause I think like you, I think that he (Eissler) really did know somewhere that I wouldn't do what he did – that I would do much more. And be much braver and

that these are the things he couldn't do, but secretly wished to do.

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Tape 17 – Side B at 41:14-42:2

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MASSON: Sure, well, listen, you have to keep your total freedom for it and, you know, just do what has to be done, uh, I don't think, you know, I mean certainly for you it doesn't matter if it comes just before or just after the book and I don't think really, you know, I mean my concern cannot be with how well the book sells. I think the book's going to sell on its own because of what's in it and –

MALCOLM: Definitely, that's right, yeah.

MASSON: – it just has to take its chances out there in the real world and that's –

MALCOLM: Well, you've got a good publisher, that's, that really –

MASSON: I've got a good publisher and *The New York Times* is definitely going to do the story before the book comes out – on the book, and I, you know, even my typist, just some ordinary typist typing it, she said, "God, I can't imagine what analysts are going to say."

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Tape 17 at 43:3-44:9

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MASSON: I can't imagine any analyst reading that [Masson's] book and coming away indifferent.

MALCOLM: Yeah, yeah.

MASSON: It's just not possible, you know, it's just too, the material itself is just too powerful, uh, all this stuff so, but I'll see – I'm going to have some idea. They've asked me to give, uh, a big lecture in May here on Emma Eckstein.

MALCOLM: Um-hmm.

MASSON: Emma, uh, Freud, Fliess and Emma Eckstein, at the university, so, uh –

MALCOLM: So you'll get a sense of the reaction?

MASSON: I'll get a sense of the reaction from that. I'm really kind of curious.

MALCOLM: Will there be analysts at that lecture too, or or no?

MASSON: Oh yeah, I'm sure they'll come, yeah, cause it's being widely advertised so they'll all come into it, uh, but I, you know, I more or less know, I don't really know what the analytic reaction will be when they actually see this stuff in cold print but I know that it's not going to be a minor one, I mean, they're going to get really upset and especially in the new version. It's much tighter, you know, and the whole thing, it's just more, in a way uncompromising. It doesn't let you go, you know.

MALCOLM: Um-hmm, um-hmm.

MASSON: And I think one of the problems with the earlier version, the one you said, is that I gave so

much material and so many other opinions that people could be deflected.

MALCOLM: Um-hmm, um-hmm.

MASSON: And deal with, with things, but I think this way they are going to be forced to deal with the issues.

MALCOLM: Um-hmm, um-hmm.

MASSON: Which I really think are important ones. I really do. And I, I just can't believe that it's not going to affect analysis.

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Tape 13 at 40:9-28

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MASSON: He writes beautifully. He writes very well and very clever and he's good, you know. But he's not a discoverer in the way I am. He won't go out and find new things. He waits until you bring it to him and then he'll look and say, "Yes, I see." But he gets bored very easily. He'll say, "Okay, I see it, don't bother me." He mainly spends his time mocking the people who don't do that. [laughs] At which, he's very good and the two of us together is devastating. If there's some poor guy around who's not as quick as we are, I mean, it's just terrible. People hate us. We're a terrible team.

MALCOLM: [laughs] And talking with Indian accents.

MASSON: [laughs] And talking with Indian accents to boot, I mean unbearable, no question of it, but

yeah, no, I didn't enjoy talking to him as much as I enjoyed talking to Terri because she can really think and she's always more deep than I was about everything she'd done. And it was very exciting for a while and I think the two of us, I think that was what our marriage was, you know, a real hive that we had, a real intellectual hive. I can't think of any two people that have ever had a more intimate intellectual relationship than Terri and I.

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Tape 2 at 5:1-22

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MASSON: Aaah. This is critical. This is really where it all started.

MALCOLM: And you found this in Anna's cupboard?

MASSON: The whole story and it is, I mean, that's, that is the wedge that's going to topple psychoanalysis. That story.

MALCOLM: But if you topple it and it's the best show in town, and then you're going to have no show.

MASSON: Right.

MALCOLM: So what is, what is everybody going to do?

MASSON: Well, that's a good question. But that's another question. [laughs] I mean, that's not, that's not my business.

MALCOLM: Because everybody [???]

MASSON: I mean, in a sense Eissler could say that. Suppose Eissler were like you, listening, and he says: "You know, you're right. I've looked at all the evidence, I've read it, you're a hundred percent right. But are you aware that if you go out and say this, if you publish this in *The New Yorker, The New York Times*, and you publish your book, do you realize what you're doing to the public? Do you realize you will – psychoanalysis will disappear as a profession and what will replace it, Masson? Huh?

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Tape 3 – Side B at 45:6-23

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MASSON: And I realize – you know, Fichtner was trying to explain it when I was here. He said, "Look, Jeff, you've got to understand that people like that and me," he said, "you know, spend our lives desperately searching for one single unpublished Freud letter, and we get it and you look at it and say, 'Ech, it's not so interesting,' because you were given thousands of letters. It's just not fair. You've got to put yourself in our place." And, of course, he's right.

MALCOLM: Um-hmm.

MASSON: I mean, for a Hartmann or a Swales or a Fichtner, you know, they turn up one thing, it then becomes part of their life.

MALCOLM: Yeah. Yeah.

MASSON: And to have someone who then has hundreds and thousands of these look at it, and you

know, say, "Yech, big deal," it's like telling some, you know, peon in South America, who discovered a tiny little diamond and brings it to De Boer, you know, for De Boer, it's nothing; but him it's his life.

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Tape 5 at 33:10-33:26

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MASSON: I mean, I've had people say to me, "I have spent my life trying to get one letter of Freud's, and you go there and Anna Freud opens up her bloody desk to you. Why? Why you, you little son-of-a-bitch? What did you do?" And I said, "Well, I don't know." In Chicago that was actually a question from the audience. One of the senior analysts said, "I just want to ask one question. Why you? Who's ever heard of you? We've never heard of you. You're not famous. You haven't written much. You're a nobody. Why should you get all these privileges and we get nothing?"

MALCOLM: How did you answer that?

MASSON: I finally said, "Because I'm smarter than you."

MALCOLM: [laughs]

MASSON: Which is true. "And I know more, too, and I've got more guts and I asked. And I mean, there are all kinds of reasons, and I'm actually very good at what I do," and so on and so forth.

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Tape 12 at 10-11

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MASSON: Well, but you see, then you have to realize it wasn't just Eissler. If it were just Eissler, and it was just a question between me and Eissler, me and Calef, I mean, okay, it's me and the whole of psychoanalysis, as you'll soon see.

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Tape 6 – Side B at 45:1-20

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MASSON: I liked the fight but I was in a very strong position in a way. They had really nothing to say beyond, "We're going to fire you because Eissler's told us to." They didn't know anything else and I knew everything and Eissler knew everything. So, I had a lot to say and they really had nothing to say and I could show them up for the cowards they were and I guess I got a certain pleasure from that unfortunately. I would have wanted one friend to be there, someone like Bob or Terri, just one witness of what was going on.

MALCOLM: Yeah, yeah, that's too bad that –

MASSON: It would have pleased me enormously because I was doing, I mean, in effect, I was taking on, it's like, you know, these child fantasies or these Kung Fu movies, you know, where Bruce Lee takes on fifty men.

MALCOLM: Yeah.

MASSON: It was that kind of thing, you know.

MALCOLM: Yeah.

MASSON: There were these thirteen older men, grown up, training analysts, every single one of them fighting me, and they were losing badly. I mean, they just were no match.

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Tape 5 – Side A at 16:28-17:19

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MASSON: I want to know what analysts are going to say when my book comes out. I'm really curious because they can't dismiss it the way they can dismiss Sulloway or Roazen. It's not light-weight like Roazen; it's not pretentious like Sulloway. There are new documents. There is no way they can dismiss it. I know that. That is, no serious scholar is going to be able to say: Well, this is just nonsense. They are going to be utterly dumbfounded, and I really believe it is true. Everything I say in there is true. And I think it's going to have a slow effect. I think it's going to eventually break the edifice apart. Just because people are going to hear about it. By luck, it's become well known already. I mean, there is going to be a big press about it, and it's going to be read by a lot of people, and it's going to sink in. You know, patients are going to read it and say: Jesus Christ, if this is really true, and it sure looks that way, what the hell am I doing with this man?

MALCOLM: Are you saying that everybody in this profession is corrupt beginning with Freud?

MASSON: Yes.

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Tape 5 – Side A at 24:1-20

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MASSON: Yeah, my own book. See, I'm not going to interpret in that book. Like I'll give that passage; I won't say a thing. I'm not going to say –

MALCOLM: Will you write an introduction?

MASSON: Yes, a long introduction, but purely scholarly: all the new information I've discovered, but nothing interpretive, nothing, what a shit Freud was [laughs], nothing, just –

MALCOLM: And this will replace that old –?

MASSON: Yeah, *The Origins of Psychoanalysis*. Kris and Anna Freud and Maria Bonaparte.

MALCOLM: When will it come out?

MASSON: I hope September.

MALCOLM: Then both books will come out in September?

MASSON: That's what I'd like.

MALCOLM: Um-hmm.

MASSON: But I think it's going to take longer. It's a, it's a huge three volume work, the Letters, so I don't know. It may take longer. But that is definitely going to shake analysis, too, and that won't be my fault because all I've done is edit the Letters.

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Tape 9 – Side A at 30:2-22

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MASSON: It was the publicity. He said, "If you had published that article in *The Journal of the American Psycho-Analytic Association*, I would have had no objection, but that you went to *The New York Times*, that, that's it, that's what did it." And I reminded him, "I didn't go. You sent them." He said, "Well, you should have been more discrete [sic]." I said, "Okay, so I was somewhat indiscrete [sic]." "You showed poor judgment." "Fine, I showed poor judgment. Is that any reason to destroy my career?" "Yes." But then, why? The question is why? You see it wasn't just really around me. That's the, that's the whole point. I mean, there was some sense in which they were smarter than I was. They sensed underneath this was a whole groundswell and once this was totally out, all these things I had discovered, it would end up by toppling the business of analysis, and that I really believe. I believe that it's got nothing to do with me, and there's no way I can stop it then when my book comes out and all of this is known, it is going to be the beginning of the end of analysis as a profession.

MALCOLM: Do you have a name for your book yet?

MASSON: Well, I call it, "The Assault on Truth," but I don't like the title.

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Tape 17 – Side B at 55:2-14

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MASSON: Oh, they'd just stall it forever. And they would hope that somebody would not call attention to anything. Not that I have, mind you. I have been very careful not to use it as a, uh, loudspeaker for my views. There are no, I mean I don't even say, "Note what Freud says," I just simply annotate it in a purely historical manner, but I think that they're so frightened – Anna Freud was and Eissler of what this, the implications, the full implications, I mean, that's the book that's going to bring down psychoanalysis. Uh, not mine, but only because my book is there, you see –

MALCOLM: Yeah.

MASSON: – it wouldn't have without mine; it would have taken years before anybody would have picked up anything.

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Tape 22 – Side B at 18:1-21

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MASSON: But it, yeah, but I don't think there are too many interpretations possible of this kind of material. You know it's just overwhelming the amount of, of information that's been suppressed and so on. I mean it's clear to me that Anna Freud and Ernst Kris just wouldn't allow Freud to say what he wanted to say.

MALCOM: Yeah, I see.

MASSON: You know and I think Eissler would have admitted that. I think if I had said to him: "Look, you know, I'm not going to ever say this, but just between you and me –," he would've said, "Yes, you're right, but never, never tell the *goyim*." [laughs]

MALCOLM: [laughs]

MASSON: It's true. That's, that's what he would have said: "Never let it out. It's just between the two of us. We can know this. We're strong enough to digest it. But anybody else, it would collapse – It would be the beginning of the end of psychoanalysis." And the, of course, then the next step would have been to say: "But, Dr. Eissler, surely we don't have the right to hide away information simply because it's going to destroy a profession, if it's the truth?"

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Tape 7 – Side A at 22:2-25

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MASSON: Yeah, but Janet, they haven't seen my book.

MALCOLM: I see.

MASSON: I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.

MALCOLM: Uh huh. Yeah, but I mean they may still be friendly toward you.

MASSON: No, never. I assure you.

MALCOLM: You think Shengold wil [sic], will be unfriendly –?

MASSON: Absolutely, absolutely. They will not, I mean, they may do it very privately. Look at the fact that I was not any longer invited to anything after this.

MALCOLM: Uh huh.

MASSON: I mean, why would that be? I'm the same person, right? And even the opinions I have are identical. Everybody knew the opinions I had and as long as Eissler was behind me and Anna Freud was supporting me, I was invited everywhere.

MALCOLM: Yeah.

MASSON: And loved, even though hated in some way.

MALCOLM: Yeah.

MASSON: And now, nobody. Not a single analyst. I never have any contact now with analysts.

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Malcolm Deposition at 271:7-272:22

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Q Then, after that sentence you write:

"Wait until it reaches the best seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back. They will say that Masson is a great scholar, a major analyst – after Freud, he is the greatest analyst who ever

lived. Suddenly they will be calling, begging, cajoling. 'Take back what you said about our profession; our patients were quitting.' They will try a short smear campaign, then they will try to buy me, and ultimately they will have to shut up. Judgement will be passed by history. There is no possible refutation of this book. It is going to cause a revolution in psychoanalysis. Analysis stands or falls with me now."

Was that conversation tape recorded?

A It was not.

Q Do you have a note of the conversation on the telephone a few days after you returned to New York?

A I do not.

Q Did this conversation take place within a few days after you returned to New York?

A I believe so.

Q Was this written just from memory?

A No, I relied on tape recorded – other tape recorded conversations of the same kind.

Q Let me see –

A There are excerpts. I took things from other conversations on the subject of Mr. Masson's book to reconstruct this conversation.

Q Let me see if I understand what you are telling me now. You are conveying to the readers that you had a telephone conversation with Mr. Masson; is that correct?

A That's right.

Q You are saying that some things he said at another time you are now using to create this conversation that you are writing about; is that correct?

A I certainly said nothing of the sort. I never used the language you used, so let's go back to some reality here.

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Malcolm Deposition at 294:5-23

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Q Didn't Mr. Masson tell you that none of the analysts will accept his book?

A That's correct.

Q Did you write that anywhere in these notes?

A I don't think he told that to me – while we were talking he did not say that, as far as I can recall.

Q Maybe I misunderstood you. I thought I asked you a moment ago as to whether Mr. Masson had told you that the analysts would not accept his book.

A Oh, many times he said that; correct, yes.

Q Is it your testimony that before the meeting at your home you had many conversations with Mr. Masson, where he told you that analysts would not accept his book?

A Correct.

Q Is it your testimony that on this meeting that you tell us about at your home, where you wrote notes that

ultimately became Exhibit No. 16, that Mr. Masson never made that statement to you?

A I can't answer one way or the other.

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Malcolm Deposition at 295:23-296:23

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Q At the visit in your home did Mr. Masson say anything about whether analysts would accept or not accept his book?

A Sure, we have my notes here, where he is discussing what he thinks the analysts will do when his book comes out.

Q He is telling you that they will say he is a great scholar?

A Eventually.

Q Does he say eventually?

A "They will want me back, blah, blah, blah."

Q Did you find any inconsistency in what he was saying at this visit to your home and what he had been saying to you before?

MR. KENADY: About what, the reception his book would receive?

MR. MORGAN: Sure.

A It is a contradiction. He said both things. He would sometimes be in a mood to talk about how they would hate his book, and then he would be in another mood and imagined them jumping on the bandwagon.

Q Other than Exhibit No. 16, are you able to point to any document, any notes you made, where Mr. Masson said that analysts will be jumping on his bandwagon?

A That's correct; I don't have any.

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Malcolm Deposition at 297:15-23

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Q When was the first time that Mr. Masson ever said to you that analysts would accept his book?

MR. KENADY: We should establish a chronology.

A In that conversation after his book was accepted by Farrar, Straus, to the best of my recollection, he indulged in some such hyperbole as he indulges in here, you know, some of this is – this is not to be taken literally. This is –

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Malcolm Deposition at 302:2-303:17

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Q Do you recall Mr. Masson telling you, "There is not going to be a single good review of my book. Every analyst in the United States is going to dump on it. You will not hear a good word about me from any analyst you interview."

Do you remember him saying that to you?

A I remember he said that many times.

Q Do you remember saying to him, "Maybe they will speak more kindly of you than you realize"?

A I don't remember saying that.

Q Do you remember him saying to you that they won't?

A Again, I take it you are asking me if, besides reading this, if I remember this conversation.

Q Yes.

A I only remember that many times Mr. Masson would talk about how his book would not be read or liked and that people would only focus on him, personally.

Q It is your testimony that one time in November of '82 and one time in April or May of 1983 he said just the opposite; is that right?

A I don't conceive of it as being the opposite.

Q Then do you understand, then, what you – or are you saying to us that what you wrote on page 117 and 118 of Exhibit 15.2 fairly represents what Mr. Masson had been telling you?

A It is another expression of his contempt for analysts. And sometimes he put it in a way that was – well, he put it as people who would not even take the trouble to read his book or would not want to confront the ideas, and they would just be interested in his personality. And in other instances, in a different mood and spirit, he would say – he would express his contempt for analysts, as he does here, saying that they are the kind of

people who, if something gets popular they will come crawling, and so on.

Q Other than this so called telephone conversation in November of '82 and this so claled [sic] meeting in April or May of 1983, did Mr. Masson ever make that statement to you that they would come crawling to him?

A I have a recollection of him saying this.

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***In the Freud Archives* at pages 53-54**

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While Masson spoke on the telephone, I pondered an incongruity that had struck me the night before while I was reading the paper he had delivered before the Western New England Psychoanalytic Society, in New Haven. In marked contrast to the extravagantly anti-psychoanalytic and anti-Freudian stand that Masson was now taking, the "Yale paper," as Masson likes to call it, even though the society has no connection with Yale, was respectful of psychoanalysis and of Freud, and its tone was scholarly and fairly quiet. Here and there in it, Masson would lapse into a kind of boyishness he is prone to, but on the whole the paper was as sober, and even, in places, as tedious, as the general run of psychoanalytic papers. . . . When Masson hung up the telephone, I told him of these impressions, and asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become.

Masson sidestepped my question. "You're right, there was nothing disrespectful of analysis in that paper," he said. "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in. The paper was very scholarly, and I thought analysts would be fascinated by my discoveries and would receive them with great warmth. But something causes analysts to ignore my material and to focus on me."

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Tape 6 – Side B at 50:20-52:3

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MASSON: So they couldn't really judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh, –

MALCOLM: What were the circumstances under which you put it, do you remember or what?

MASSON: That it was, was true.

MALCOLM: Yeah, yeah, I see.

MASSON: As simple as that. I really believe it. I didn't believe anybody would agree with me.

MALCOLM: Um-hum.

MASSON: But I felt I should say something because the paper's still well within the analytic tradition in a sense. Unlike the Ferenczi paper.

MALCOLM: Yeah.

MASSON: It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile and I believe that one, but so does Anna Freud believe that, so does Eissler believe that, though they would never say it publicly.

MALCOLM: And they wouldn't say it's because of Freud himself.

MASSON: Well, I didn't exactly say that. I said, "He began a trend away from the real world that has come to a dead halt," and that's what I believe.

MALCOLM: Yeah.

MASSON: So, I mean, whether you say Freud was responsible or not, I don't know. But I mean, certainly there are some, uh, yeah, he is responsible. [laughs]

MALCOLM: Um-hmm.

MASSON: Well, I mean, they got that right, sure. But anyway, I have a right to my opinion, and that is, after all, only speculation. I don't know why psychoanalysis is sterile today.

MALCOLM: Yeah, yeah.

MASSON: But it sure as hell is.

* * *

Masson's Letter

October 12, 1981 letter to Board of Directors of Freud Archives: "The last paragraph of the paper on seduction that I gave to the Western New England Psychoanalytic Society, in which Dr. Eissler felt that I was laying the blame for the current sterility of psychoanalysis on Freud's abandonment of the seduction hypothesis. I agree that this paragraph of my paper was unfortunate, and

poorly worded. I do believe, however, that current psychoanalysis, around the world, is not very vital, and I do sometimes wonder whether this has anything to do with a turn away from the real world. But these are my own private opinions for which, of course, nobody is responsible but me. This is as much as I know about how I have come to be here and would very much like to learn more."

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Tape 1 at 45:24-28

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MASSON: Cause I said, my last comment was, – God, I can't remember now. I'll read it to you, but it was an offensive comment. About, something, "This explains the current sterility of psychoanalysis throughout the world." Which I believe.

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Malcolm Deposition at 290:2-10, 17-19

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A This is a statement that Mr. Masson made to me at some time, yes.

Q You were representing to the readers that was a quote from Mr. Masson; is that right?

A Mr. Masson refers to this coda in his speech many times.

MR. KENADY: What does coda mean to you?

THE WITNESS: End.

* * *

A I remember what I was about to say. Again, this is the substance of many conversations that Mr. Masson and I had on the subject of this coda.

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Malcolm Deposition at 291:2-17

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Q Do you have any notes, records or memoranda of any statement by Mr. Masson where he said, "I don't know why I put it in"?

A No, that one I cannot substantiate.

Q Mr. Masson told you why he put in the statement, didn't he?

A Sometimes he did and sometimes he didn't in our discussions. I do remember once he said, "I don't know why I put it in." That lodged itself in my mind.

Q Are you able to point to any part in the transcript where Mr. Masson said that?

A I think it is in the transcript that he said it was gratuitous, which, in a sense, has some of the meaning of I don't know why I put it in. If you are putting in something that is gratuitous, then maybe you have a little doubt about why you put it in.

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Malcolm Deposition at 298:6-19

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A I have a recollection of a conversation with Mr. Masson where he said that he didn't know why he put it in. I don't remember whether it was on tape or not.

Q Have you ever seen any transcript where that statement is there?

A I cannot think of one.

Q Have you ever seen any note of yours where that statement is there, and because you say that, that statement was unrecorded?

A I think offhand this is a recollection, rather than something that is documented.

Q Are you saying that you are not aware of any note, record or memoranda of such a statement by Mr. Masson?

A I am not.

* * *

Malcolm Deposition at 300:21-25

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Q When he said, or when you wrote that he said, "I don't know why I did it," what did you intend to convey to the readers by that?

A Well, I was conveying what I think he meant to convey, which was that it was an impulsive decision.

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Malcolm Deposition at 312:8-21

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Q Did Mr. Masson ever answer your question?

A Let me put it this way. I never said, "Jeff, what has brought on your sudden virulent anti-Freudianism," as far as I can remember. Maybe you can find it in the testimony and I am mistaken. I am talking about my state of mind here and not Mr. Masson's. I am saying that my question about this was not answered. This is the meaning that I meant to convey with this passage.

Q Maybe I misunderstood you. Are you saying that you never asked the question, "What brought on your sudden virulent anti-Freudianism"?

A I don't believe I asked it as such. You may correct me if I did. That was not my meaning in this piece of writing.

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***In the Freud Archives* at pages 149-50**

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It was the same thing with my discovery about the Schreber case. That was even more appalling. I found an 1884 article in Freud's library written by Paul Flechsig, Schreber's psychiatrist, which he had personally sent to Freud, reporting that he performed castration experiments on hysterical and obsessional patients in his asylum. This means that when Freud wrote his essay on Schreber he knew that castrations had taken place in the asylum where Schreber was held, but he still could write that Schreber suffered from the *delusion* that the great Paul Flechsig wanted to castrate him. I think Freud was a great and remarkable thinker, but *he wasn't honest*. He was a man who just lost his courage. His entire theory after he abandoned seduction was the product of moral cowardice, because Freud knew that Schreber was in an asylum where they were trying to castrate him, and he never mentions it. Now, what would you say about somebody like that? No matter how brilliant he is, how good a thinker he is, he is not being honest if he omits that fact from his essay."

"That's a very serious charge against Freud," I said. (Later, it occurred to me to wonder if Flechsig had not sent Freud the article *after* Freud had published his essay on Schreber; when Flechsig's article first appeared, Freud was an obscure young neurologist, to whom an eminent psychiatrist was not apt to send complimentary reprints.)

"There aren't too many interpretations possible of my discovery," Masson said grimly. "I think Eissler would have admitted that I was right. I think if I had said to

him, 'Look, I'm never going to make this public – this is just between you and me – but just take a look at this,' he would have said, 'Yes, you're right. But never, never tell the goyim.' I swear that's what he would have said. 'Never let it out; it's just between the two of us. We can know this. We're strong enough to digest it. But for anybody else it would be the beginning of the end of psychoanalysis.' It would have been like Dostoyevski's Grand Inquisitor."

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Tape 2 – Side B at 47:8-50:19

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MASSON: You know, it's interesting because that comes up in the Schreber case. That it was Niederland, this New York analyst who discovered for the first time that, you know, Schreber was in this asylum in Leipzig that was run – the university clinic of Leipzig was run by a man called Flechsig, Paul Flechsig who was a famous psychiatrist. And it turns out that Flechsig, – and he then had the quote "delusion," according to Freud, that at the asylum they were trying to "unman" him, castrate him, turn him into a woman. The only problem was that Niederland turned up a very important article by Flechsig in which he reports cases of actual castration in his asylum.

MALCOLM: God!

MASSON: "Paranoid beliefs!"

MALCOLM: Um-hmm.

MASSON: Now what I did, I went a step beyond Niederland but it was important. He wouldn't draw any conclusions from that, but I did something even more. It turned out that not only did that take place, but the article in which he reported it he had sent to Freud! Flechsig. And Freud has that article in off-print form in his library! From Flechsig. So Freud knew when he was writing the Schreber case that Flechsig had performed castration! And still did not write that maybe there was some truth to what Schreber was fearing.

MALCOLM: So you've developed a very ambivalent view toward Freud, haven't you?

MASSON: Uh huh! It's more than ambivalent. I think he was a great and remarkable thinker but he was still a, a, a man who just lost his courage.

MALCOLM: Um-hmm.

MASSON: He was a brilliant mind who didn't have the courage to stick with things that he knew were true. I mean, just look at that Schreber thing! He must have known it. When he came to write that, he did not say so. Why? Cause he didn't want to insult a famous psychiatrist like Flechsig. And because he knew it wouldn't be good for his theories. I mean that's all supposition. But I mean, something happened.

MALCOLM: Yeah.

MASSON: It's not honest in the end. You don't write – And it was the first piece ever written on the psychology of homosexuality, the first attempt to unravel the mystery of homosexuality by Freud. It's a brilliant and convincing thesis. And it's dishonest. Cause he knew

that the man was in an asylum where they were trying to castrate him! And he doesn't mention that. Now what, what would you say about somebody like that?

MALCOLM: Yeah.

MASSON: No matter how brilliant they are, how good a thinker, they are not being honest if they omit that fact from their essay. Suppose you had a student who had done that. What would you tell them?

MALCOLM: That's a very serious charge against Freud.

MASSON: Umm. Exactly.

MALCOLM: And this, now this is the sort of thing that would have made Anna Freud afraid of you.

MASSON: Uh huh. Yeah. But why? I mean, was she afraid that I was inventing these things or was she afraid they were true?

MALCOLM: True. But it would be very difficult for the daughter of a great man to –

MASSON: Of course. Oh, but that's why I didn't want to publish my book during her lifetime. I mean, it would have poisoned her last days if she had seen that. I mean, what can she do with that kind of knowledge? It will be interesting. What will Eissler do with it? What will he say in excuse? Cause he will find an excuse. He'll say, "It's perfectly normal that Freud didn't mention it."

MALCOLM: Well that would be interesting: what reason he would, he would give.

MASSON: Uh huh. Pin him down.

MALCOLM: So you have letter fro – tell me this again. From – Freud –?

MASSON: Which one, the Flechsig story?

MALCOLM: Yeah.

MASSON: Very simple. Fleschig [sic] wrote an article in 1880 called *"Zur gynaekologischen Behandlung hysterischen Krankheiten,"* "On the gynecological treatment of hysterical illnesses." Hence, a topic of real interest to Freud. Freud has an off-print of that article in his library, catalogued. Flechsig runs the sanitorium at Leipzig in which Schreber is incarcerated in 1892. Freud knows that. So Freud knows for certain that Flechsig had performed castration experiments on hysterical people and people suffering from obsessional neurosis which is what – and paranoia which is exactly what Schreber has.

MALCOLM: That was allowed? They could do that?

MASSON: Allowed! He would – yeah. He could do anything he wanted. A medical doctor could do what they wanted then. Now, the point is that Freud then writes this essay on Schreber in which he tries to find the origins of his homosexuality in his relationship to his father. He said he suffered from the delusion that the great Paul Flechsig wanted to castrate him.

MALCOLM: Yeah.

MASSON: Paul Flechsig *did* want to castrate him.

MALCOLM: Yeah. Yeah, yeah.

MASSON: And Freud wouldn't admit it, even though Freud knew it was true. Now, okay. What could one say in Freud's defense? He forgot?

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Tape 1 – Side B at 61:16-62:16

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But in order to understand the genesis, I mean, it's like Schreber. Can you understand Schreber unless you know what his father did to him? Freud thought you could and it's not true. Moreover, Freud is lying. I found a letter just last week, an unpublished letter in which he tells Ferenczi, "Can you imagine? The father was a tyrant." [There was a] whole story about the father. He knew about the father. But he wouldn't publish it. When he came to write his article he omitted it. And that was not known. And I'm the first person to know that. Now that, I mean, so, blatant – Why would Freud do that? Why would he write about the genesis of homosexuality and say, "it comes from fantasies about a father and this father was a wonderful man, he was a physician, the famous Dr. Gottlob Moritz Schreber whom everybody adored, uh, perfectly appropriate to see him as a god, since he was a physician of renown," when he knew that wasn't true?

MALCOLM: So you're saying that Freud to make this theory come out –?

MASSON: Yes –

MALCOLM: [???]

MASSON: He was willing to forget everything that he knew that was really true. He forgot everything that happened to him in Paris. Well, "forget." Who can say what happened? Except I know for a hundred percent certain now, I can prove it, I mean, that Freud saw cases of children who had been sexually abused by their parents in Paris in 1886. Now we can then say: "What happened to that? Did he forget it? Did he suppress it? Did he obliterate it from his mind? Did he repress it?" We don't know.

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Tape 9 – Side A at 3:17-5:28

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MASSON: Because even Niederland who discovered this before I did, though he didn't know that Freud had the article in his possession; he found the article by Flechsig and he said, "It still doesn't make any difference." It's very interesting to know this but Freud's essay is still the greatest thing that we have and nothing should be touched, and he also writes: "I can't see any reason why Freud would have changed his views had he known the author's, the, uh, Schreber's father's works. There is no reason for him to do so." That's just not true.

MALCOLM: Now the works, these are the, uh, these are the journals where he tells what he did to the boy?

MASSON: No.

MALCOLM: Well, I would think that would make an enormous difference.

MASSON: But Niederland doesn't, and Niederland discovered them; he discovered, I mean he was the first to bring them to attention.

MALCOLM: And it is known that Freud also knew about them?

MASSON: No, no.

MALCOLM: Freud didn't.

MASSON: We don't know.

MALCOLM: Yeah, Yeah.

MASSON: I now know for sure – something that was not known before: namely that Freud wrote to Ferenczi, "The father was a tyrant."

MALCOLM: Suggesting that he might have known –

MASSON: Suggesting that he might have known something beyond what he told us. Or that could have been an interpretation.

MALCOLM: Yeah.

MASSON: If the father were a tyrant, then we could understand, but the important thing is that Freud never brings this into his essay, never says, "Suppose Schreber's father was in fact a vicious man, what then? What does this do? What is the significance of this?" He doesn't. He says his father was a wonderful physician. And that's dishonest, too, you see. Time and time again, Freud is dishonest, and this is the thing that Schur was beginning to realize.

MALCOLM: Well, are you going to really come out and say this in so many words?

MASSON: Why not?

MALCOLM: Yeah, yeah.

MASSON: It's true. What should I do, say the opposite?

MALCOLM: No.

MASSON: Of course, and if I'm wrong, I'm wrong, fine, but you can't say I'm wrong because I'm Jeff Masson and young or whatever. I mean, you have to say, "No, Freud didn't have the article; Masson has discovered the wrong –" I mean you can't say, "Everything that Masson says is correct historically but his conclusions are totally false because he's a, you know, loudmouth or whatever." I mean, those kind of *ad hominem* arguments are no good, and that's why I'm glad –

MALCOLM: Yeah.

MASSON: – I'm bringing out the book and that's why I'm somewhat inclined not to do it with Farrar, Straus, but to do it with Harvard, who will let me, you know, give my fourteen hundred footnotes, giving all the documentation and let people argue with the book.

MALCOLM: Yeah.

MASSON: You know, but the other thing is separate, that's something that should come out of your article – the whole story behind it which is, I frankly think, a fascinating story.

MALCOLM: Yeah.

MASSON: And it is intimately connected to all this. I mean, it effects [sic] everybody really. But it is separate from the kinds of things I discovered.

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Tape 9 – Side A at 1:12-2:10

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MASSON: Yeah, I mean, look, Schreber was psychotic, no doubt he did have delusions and strange thoughts and fantasies. The question is you cannot form a theory about the origins of homosexuality based on pure fantasy when this kind of thing is going on in his everyday life. And Freud knew it. I mean, it's not even as if he mentioned it to dismiss it, which he'd have a right to do, right?

MALCOLM: Yeah.

MASSON: He could say: I have here in my library an article by Paul Flechsig, in which he recommends castration. Now, you may wonder whether this had anything to do with Flechsig, with Schreber's delusions. My answer is: It did not.

MALCOLM: Uh huh.

MASSON: And it leaves the reader the opportunity to think about it by providing evidence he knew to be germane to the issue, but Freud doesn't do that. He passes it over in total silence. And that was a horrible revelation to me. I didn't think Freud would do something like that. I honestly didn't. I even wrote in my Schreber paper when I – the one that I met with Eissler over, I said, "I cannot believe that Freud knew the works

of the father. I simply do not believe he knew them because if he did, he wouldn't be able theoretically to ignore this and –

MALCOLM: Yeah.

MASSON: [illegible]v, I know that's not true.

MALCOL[illegible] So what did Eissler say then?

MASSON: He agrees with me, of course.

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Tape 22 – Side B at 17:5-18:18

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MASSON: Not my views because they're really the views that he would have shared. I mean if i could've had enough time with Eissler looking at these documents, he would have said, "You're right, but let's never tell anybody. Let's – "

MALCOLM: You mean he, he would've – But he seemed to disagree that the, the seduction theory was, was correct. He kept saying, "No, it's wrong and he knew that Freud knew it was wrong and – "

MASSON: Yeah but if, I mean if he had let me talk to him long enough about all the new material, he would've had to share more or less my point of view.

MALCOLM: Um-hmm. You really think so?

MASSON: Oh yeah.

MALCOLM: You think you could have persuaded him?

MASSON: Oh yeah, oh yeah, I mean, you know, I really believe this book that I'm writing is not, you know, it's not just an opinion. It is the truth.

MALCOLM: Yeah.

MASSON: I mean that's true. It's historical stuff and you know, sooner or later it's going to be recognized. I mean cause it's not my opinion. It's different if I were to simply say, "I think Freud was wrong to abandon seduction." That's just my opinion, right?

MALCOLM: No, but it is your interpretation of, of, of –

MASSON: But it, yeah, but I don't think there are too many interpretations possible of this kind of material. You know it's just overwhelming the amount of, of information that's been suppressed and so on. I mean it's clear to me that Anna Freud and Ernst Kris just wouldn't allow Freud to say what he wanted to say.

MALCOLM: Yeah, I see.

MASSON: You know and I think Eissler would have admitted that. I think if I had said to him: "Look, you know, I'm not going to ever say this, but just between you and me –," he would've said, "Yes, you're right, but never, never tell the *goyim*." [laughs]

MALCOLM: [laughs]

MASSON: It's true. That's, that's what he would have said: "Never let it out. It's just between the two of us. We can know this. We're strong enough to digest it. But anybody else, it would collapse – It would be the beginning of the end of psychoanalysis."

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Tape 17 – Side A at 13:4-27

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And had Eissler said that to me, "How can I ask you to be running the museum in Anna Freud's house when you yourself are discovering so many unpleasant things about Freud? Of course they're there. Of course they're real. Of course your interpretations are correct. You're a historian but then you shouldn't want to be part of this." And I would say, "Well, you know," I'd say, "Yeah, I guess you're right." He'd say, "The only honorable thing to do, Jeff, is to resign." And I'd say, "Yes, yes, you know, I, I see, you're right. I understand that." But that's not what they did. You know what they had to do was trivialize what I had found, pretend that I was some sort of, uh, narcissistic uh –

MALCOLM: Yeah, that's a, that's very, this is very interesting what you're saying, Jeff, because then this leads to the question: If they had done it in this, what you would think of as a proper way, uh –

MASSON: Yeah.

MALCOLM: – then you, would you then not have sued them?

MASSON: Of course not. I told them that.

MALCOLM: Yeah, yeah.

MASSON: I said that. I mean it was the cover-up; it was the attempt to pretend that somehow this was all my fault. Furst said it. I mean he came out. He said,

"God, of course you're right. Everybody in that rooms [sic] knows you're right, Masson."

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Malcolm Deposition at 496:16-21

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Q Are you saying that Mr. Masson said, "It was the same thing with my discovery about the Schreber case. That was even more appalling," was something Mr. Masson said to you at some time, and you recall it but you did not make any note, record or memoranda of it?

A That's correct.

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Malcolm Deposition at 514:25-515:10

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Q Would you agree that at the time you wrote the article or the piece that you satisifed [sic] yourself that whatever statements that were made by Mr. Masson were dealing with the Schreber concept, as opposed to the seduction theory when you wrote the words you wrote here, that Mr. Masson said, "There are not too many interpretations possible of my discovery, and I think that Eissler would have admitted that I was right"?

A To the best of my recollection, I think that's correct.

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***In the Freud Archives* at pages 145-46**

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Everything Denise did was quick, effective, and pleasant, and she had a warm, easy way with both the girls. She was the owner of two boutiques in Berkeley and of an exercise studio that followed the principles of Jane Fonda. Her father had just lost "all his banks," she said, with a nice mixture of filial rue and self-mockery.

"Denise is *echt* California," Masson said fondly. "When I first met her, you couldn't get more than six words out of her, and they were generally 'like,' 'you know,' 'I mean, like.' She spoke in half sentences. There's something so *echt* California about that."

"It has nothing to do with California," Denise said.

"But you have a basic mistrust of speech, right?"

"It's just not fast enough," Denise said. "It doesn't say what I mean."

During lunch, Denise suddenly turned to Masson and said emotionally, "Those old people – Eissler and Muriel Gardiner – I worry about them. I feel their pain. Eissler knew he was playing with fire when he messed with you, but he couldn't help himself. You're charming – you affect people. You touched Eissler, and you hurt him. I see him bearing the pain. *But you don't feel it, Jeff.* You just don't feel it. I worry about that."

"Denise worries too much," Masson said imperturbably.

"What you did to them, is that – is that *betrayal*?" Denise asked.

"Of course not," Masson said. "What did I do? I gave an interview to the *Times*. Is that reason to destroy a man's career?"

Denise started to say something, and then thought better of it.

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Typed Transcript of Interview at Staal's House

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MASSON: There is no psychoanalyst who will say, "Masson can sit in my living room." Not one of them will allow me near them now. I have become poison.

STAAL: No, I don't agree though –

CAMMELL: But they didn't pick you up. I mean, Eissler took you completely char –, whatever it was, you did it to him.

MASSON: Yeah, but –

CAMMELL: Whatever it was to Muriel Gardiner, you did it to her. Whatever it was to those people –

MASSON: To Anna Freud, yes.

CAMMELL: And that's the le–, that's that level of, I mean, is that, be–, bu–, betrayal?

STAAL: Oh, betrayal, yeah.

CAMMELL: I mean, am I, I don't know.

STAAL: Well, he feels he is responsible himself, really. [Telephone rings. Staal answers and talks]

MASSON: But even had Frits, aah –

CAMMELL: See, I mean you're not friends with any of these people and they were people really really close to you, that you –

MASSON: But they weren't, you know, in a way, I was intellectually – Eissler –

CAMMELL: O.K., that's what I need to hear, is that they weren't close to you.

MASSON: Well, they weren't close to me the way Bob or Frits is. I mean they are not people I would go and –

MALCOLM: Maybe that's part of the answer, that they wanted to be closer to you.

CAMMELL: Maybe that's it, and they feel, that's part of the hurt and, you know, that I feel much better about, that I can deal with.

MALCOLM: Did you tell Denise about – maybe you didn't, this morning I went to talk to Victor Calef, he's one of the people who hates Jeff now. And I asked him what's going on and he said that he felt rejected by Jeff, because, and then he told me some story about how they were going to do some work together on a psychoanalysis on Bernfeld, and Jeff just didn't want to do it anymore, he had bigger fish to fry and he was wounded. So it is personal, it's about personal things and I, I think we're agreeing that there's always something personal in these –

CAMMELL: Yeah, maybe people, maybe these people really, I don't know, you are charming, maybe they really –

MASSON: Fell in love? That's what somebody said about Eissler, that he was in love – That's what Furst said. Furst said to me, he said he behaved like a jilted lover.

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Tape 5 – Side B at 49:4-22

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MASSON: No, that's the weird – First of all Simone is very close to Denise, my girlfriend. She really likes her.

MALCOLM: Denise lives with you?

MASSON: No, Denise has her own house. Denise is another very strange person. She's a daughter of a very, very wealthy man who just lost all his banks. He owned this Fidelity Savings. Did you hear about how it was taken over by Citicorp? And he was Chairman of the Board. So, she was a very, very wealthy spoiled child who had to look after her whole family. Her mother was an alcoholic. Very interesting, very attractive woman, who now runs a boutique and a children's store and an exercise studio, and just got separated from a very wealthy developer husband. God knows how we every got together. I mean, no two people could be more dissimilar. She's real California, a strange person, very attractive, very warm, very loyal, with a horrible temper. She goes into temper rages at nothing, and the opposite, too, can be extraordinarily loving and wonderful. And

she fascinates me. She has no, no interest in anything intellectual. I mean, she's always spent all her life among rock stars and movie people and strange, but very together and very real. A real California, the best sort of example of what, you know, the American ideal in some sense. It's interesting to me.

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Tape 12 at 5

• • •

CAMMELL: Isn't that what we're talking? I don't know.

MALCOLM: [???] talking about people, and Denise was saying how painful it must be for these old men back at the Institute or at the Archives, to think about this whole business, especially for Kurt Eissler, right? That he is wounded.

STAAL: I don't know anything about it, but of course I must say the fact that he gave this to a relatively unknown young person who came out of the blue speaks very well, that's a very nice – weakness, possibly, in his character. But I would say it's a strength.

• • •

Tape 12 at 46-47

• • •

MASSON: Huh? They work, she works by vibes.

CHILD: What do you work by?

MASSON: I work by speech, I'm a real talker.

CHILD: Talk, talk, talk, Chitter chatter.

MASSON: I like to hear something clearly spoken, and Denise only speaks in half-sentences.

CAMMELL: I'm, no, I'm much better. I really finish my sentences [???].

MASSON: Yeah, you're getting much better. When I first met Denise, you couldn't get more than six words out of her per hour. And they were generally like, "Yip," "No," "I mean like," and that was it. And, "You know what I mean?" And I'd say, "No," and she, "Well, thāt's it then." It's true. And there is a certain that, there is something *echt* California about that. A mistrust of speech.

CAMMELL: Nothing with California. It's nothing to do with California.

MASSON: No, but you do have a certain basic mistrust of speech.

CAMMELL: Mmmmm.

MASSON: Right?

MALCOLM: Well, as we all should really, because . . .

MASSON: Yeah, it can be too easy to talk. Oh, I'm not saying . . .

MALCOLM: I mean the relationship between words and thoughts is –

CAMMELL: It's just not fast enough, you know, it's very tricky.

MALCOLM: Well you probably don't think in words, right? You think in thoughts.

MASSON: I think in words.

MALCOLM: Yeah. You find out what you think after you finish –

MASSON: After I say it, that's right.

CAMMELL: Concepts, right, is that it?

MASSON: She knows and gives up on being able to express it.

CAMMELL: I can't get it out.

* * *

Masson Deposition at 405:15-409:27

* * *

MR. KENADY: Q. Coming now to the lunch with Denise in Berkeley, that's when Janet was invited to your home for lunch?

A. Yes. Actually she wasn't invited for lunch, we were supposed to finish before lunch and the conversation went past and I said I was unprepared for lunch, but I would see if there was anything to eat. Because she said she didn't want to go out.

"Could we just continue and have a simple bite in the house."

Q. Was her tape recording going?

A. Her tape recording was going.

Q. I see. Have you found the tape in that length?

A. I mean, I could, yeah. I haven't looked for it specifically. She shut if off during that lunch.

Q. I see. What was said during the lunch concerning Eissler and or – what, if anything concerning Eissler and Anna Freud?

MR. MORGAN: During the lunch?

MR. KENADY: Yes.

THE WITNESS: I don't know.

Why? What?

MR. KENADY: Q. Well, at what point in time, if at any point in time, do you recall Denise making a reference to Eissler and Anna Freud?

A. Oh, yes. Not at that time.

Q. All right. What time was it?

A. That was on Tuesday. This lunch was Sunday and the following Tuesday Denise and the children and I and Janet Malcolm were all in the car driving to Chinatown and that was the time that I was continuing remarks that I had been making to Janet Malcolm about Eissler.

And Denise was hearing for the first time the story of my being fired in real detail; she had not heard that before.

Q. I see. All right, continue please.

A. You mean continue with the narrative of what happened?

Q. Continue with what you recall the conversation being.

MR. MORGAN: That was taped, wasn't it?

THE WITNESS: No, that was not taped in the car. I must confess I don't remember it. However, I have read Janet Malcolm's notes, which presumably were taken right after that or at some point after that ride because she refers to the conversation that she then puts into her book.

So, all I have to go on are the notes that she has and my discussion with Denise about what was said and not said. And that conversation was continued and amplified at Frits Stall's house. And that is on tape. Unfortunately, not transcribed. Part of it had been transcribed by defendant and the other parts are still on tape and are irrelevant.

Q. What I'm interested in is whether you dispute that Denise did or did not say the words that she's quoted as saying at some point in the article?

MR. MORGAN: Which words are we talking about?

THE WITNESS: "You just don't feel it"?

MR. KENADY: Yes, it winds up with that. I think we all know what we're referring to, don't we, and maybe we better find out.

MR. MORGAN: Yes, let's make sure we're all –

MR. KENADY: Yes, I agree.

MR. MORGAN: I think it's 145 and 146 of the paperback.

MR. KENADY: Q. All right, do you want to have a look at –

A. I'm familiar with the passages, yes.

Q. Is it your testimony that the words quoted at the bottom of 145, Denise speaking:

> "Those old people – Eissler and Muriel Gardiner – I worry about them. I feel all their pain. Eissler knew he was playing with fire when he messed with you, but he couldn't help himself. You're charming – you affected people. You touched Eissler and you hurt him. I see him bearing the pain."
>
> "But you don't feel it, Jeff."
>
> "You just don't feel it. I worry about that."

Is it your testimony that Denise said those words or the equivalent in the car and also at Frits Stall's or –

A. No. What happened was – that's an amalgam. If you'll listen to the tapes, that part of that comes from – this conversation comes from Frits Stall's, identical phrases and parts of it come from notes that Janet Malcolm took, presumably from the drive over.

So, she's combined two separate conversations. And in her first – and the original manuscript, which is an exhibit, if you'll refer to it at this passage, you'll see that she places it there in the car.

And she says we were driving in the car on our way to Chinatown when Denise suddenly turned to Jeff and said – and then she gives more or less the same conversation, and then she has me say: "Denise worries too much," Masson said as he drove imperturbably on. So,

she's admitted that the conversation in her first version took place then in an automobile; and this version, it takes place over lunch, and in reality it took place in Frits' house. So, we have three different locations in reality.

MR. KENADY: I see.

MR. MORGAN: I think you'll find it's recorded in reality.

THE WITNESS: That's right. Most of this conversation is on tape taking place at Frits Stall's house, including the phrases, "Is that betrayal?" and so on and so forth.

And, "He knew he was playing with fire when he messed with you. He couldn't help himself, you're charming."

Those phrases come from a conversation recorded at Frits Stall's house.

MR. KENADY: Q. With respect to the conversations that you've just mentioned, did you say, "Denise worries too much"?

A. Absolutely not.

Q. Have you ever said that to Denise, that she worries too much?

A. Have I ever used the words "You worry too much, honey," something like that?

Q. Yes.

A. Yes, of course. I'm sure everybody has used those words at some point to somebody they love. But in

this context, impossible. Because she's expressing concern that I don't care about somebody's feelings, and I would never treat that lightly, make fun of it or dismiss it. It's not my nature to anybody.

* * *

Cammell Deposition at 14:7-18:24

* * *

Q. Do you remember at any time on this Tuesday voicing any concern about Jeff's treatment of Eisler [sic throughout passage] or of Anna Freud?

A. Yes.

Q. Would you tell us, please, what you said and – well, I'll start with that. What did you say?

MR. MORGAN: Well, you said any time on the Tuesday; is that right?

MR. KENADY: On the Tuesday.

MR. MORGAN: You're not restricting it to the drive in Chinatown or Chinatown?

MR. KENADY: I think I asked her –

Q. Well, tell us when it occurred?

A. After we left Chinatown, we were driving to Frits' apartment and before we got there the conversation turned to Dr. Eisler.

Q. How did it happen to turn to Dr. Eisler? Did you introduce the subject or did someone else?

A. I believe we were talking about my father and I drew some sort of correlation between Jeff's being fired

and certain things out of control, which can happen to people.

Somehow the conversation turned to Dr. Eisler. I believe it was in the context of my father, something.

Q. How did your father come into it or lead to Dr. Eisler? Were you talking about something that had happened to your father?

A. Yes. I was telling Janet about my father's – had been in business before and had lost his banks.

Q. I see. And your father's name?

A. A. C. Meyer, Jr.

Q. And could you spell Meyer?

A. M-e-y-e-r.

Q. And what were the names of the banks?

A. It was Fidelity Savings & Loan.

Q. Did you mention the amount of money involved?

A. I don't remember.

Q. A note from Janet Malcolm said he lost $60 million personally.

A. That's probably true, close to the amount.

Q. And did you probably say that in Janet Malcolm's presence?

A. I'm sure, yes.

Q. All right, fine. Now, I interrupted you when you were about to tell us what was being said about Eisler.

A. I asked Jeff what had actually happened. I hadn't heard the story about his break with Eisler. I had never heard it in any detail. I had heard snatchings of conversation between him and friends but we never really talked about what had actually happened. And he told me that – we started to talk about it just as we were getting to Frits's. So, when we got to Frits's, he started to explain to me the whole story of what had happened, and he told me that it was really outrageous that he had been fired for expressing beliefs where in Sanskrit he would hold opinions and he wouldn't necessarily lose a job over it. But among the analysts he – they just weren't interested in the truth of what he had to say. So, they just let him go and really threw him out, made him an outcast.

And so, he was explaining that to me, and I had been a little concerned over how they must be feeling.

Q. Who is "they"?

A. The people back East. Dr. Eisler and Merial [sic] Gardiner. And I asked him about that.

Q. And that lead [sic] to his explanation of having been fired?

A. Yes.

Q. As you understood it, for having the wrong ideas or a –

A. Well, for expressing his ideas.

Q. I see. All right, expressing his ideas?

A. Right.

Q. Why were you concerned with their feelings?

A. Well, I like Jeff a lot and I think he's a lot of fun to be around. And I imagine that a certain bright spot would have gone out of their life. So, I thought, you know, it must be kind of lonely for them, really.

I had read Janet's book, The Impossible Profession, and I imagined it must be a pretty isolated life, these analysts. So . . .

Q. All right, how did you happen to read Janet Malcolm's book, The Impossible Profession?

A. I was just curious. After she came out, I wanted to see it. Jeff had it in the house and I read it.

Q. I see. Did you read it before she arrived?

A. No, while she was there.

Q. While she was there you read it?

A. I didn't read the whole book, I was sort of running through it.

Q. So, it was in your mind that the life of an analyst may be somewhat lonely?

A. Yes, and very conformed to certain things and –

Q. Did Jeff make any response to your comment about the feelings of the, as you said, the people in the East, Dr. Eisler and the others?

A. Yes.

Q. And who was present when you were carrying on this conversation?

A. Erits and Janet and the two children.

Q. And Jeff?

A. Well, yes, he was giving me the answers.

Q. So, you made those remarks and then Jeff made some responses. Can you recall the response?

A. Well, he just gave me a very long explanation of what had actually happened. And I was – I asked him if Dr. Eisler was a friend and he said no, not really. I mean, you know, friends stand by you and I guess he, you know – he made me feel that he was a friend, a very superficial friend. He didn't come through in the crunch and it, you know – I really saw it then. You know, I didn't feel sorry for him any more.

Q. For him. And by him you mean Dr. Eisler?

A. Yes. You know, if he had stuck by him and said, look, I have to let you go but I really do understand why you had to do this, I, you know – but he didn't. He just stabbed him in the back.

Q. And your understanding was based entirely on what Jeff was telling you at that time?

A. Yes.

Q. You hadn't read Time Magazine earlier?

A. Well, I had read Time Magazine and I saw what Jeff had to say in Time Magazine. I mean, I had a superficial knowledge of what was reported and, you know, I really was on Jeff's side having also a superficial knowledge of the whole profession of analysis.

Q. At any time on this evening did Jeff make a comment to the effect that sometimes you worry too much?

A. No.

Q. Has he ever said that to you?

A. Yes. About one month ago in India I stuck my hand in X-ray machine going through the baggage and it's really the first time that he's gotten actually angry with me for worrying.

• • •

Malcolm Deposition at 436:10-22

• • •

Q. You are not saying that there is anything in these notes that you have that triggers in your mind that Mr. Masson said, "Denise worries too much," are you?

A. Yes, I am. That is just what I said.

Q. You point out the mnemonic aid that says to you that it is there.

A. It is the word – the trigger for me was the word "worry". She says here, "I worry about the future." She worries about their relationship. And I remember Mr. Masson repeatedly making these kinds of statements about Denise worrying too much. She would say these anguished things, imagining what had happened, and Mr. Masson would say she worries too much.

• • •

Masson Deposition at 303:2-25

• • •

And now that I see what Professor Ingles did, in fact tell her, I can understand his dismay. He did, indeed, give a very fair, balanced portrait of my positive and negative traits.

Q. And where do you learn what the portrait is that Ingles gave?

A. From a note from Janet Malcolm in one of her notebook discussions with Daniel H. Ingles. You have it as well.

Q. Did Ingles ever tell you that he had been misquoted by Janet Malcolm?

A. He was not quoted at all in the article.

Q. I guess it followed that he wasn't –

A. That's right. And that was his complaint, that he was not quoted. He felt that that would have helped me.

Q. What were the negative and positive traits that you had in mind when you made your previous answer?

A. Well, I don't remember the details now, but it's easy enough to check it right here. But he said something to the effect of, I consider him an outstanding scholar and he has a genuine gift for finding material that other people overlook.

On the other hand, he does have a tendency to work very fast and is careless of other people's feelings, and

tends to go through things rather quickly, and wants to find something more interesting of that.

* * *

In the Freud Archives at page 67

* * *

"[Eissler] was always putting moral pressure on me. 'Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman.' I said to him, 'What have I done? *You're* doing it. *You're* firing me. What am I supposed to do – be grateful to you?' 'You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence.' 'Why should I do that?' 'Because it is the honorable thing to do.' Well, he had the wrong man."

* * *

Tape 9 – Side B at 42:5-27

* * *

But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, "Do you want to poison Anna Freud's last days? Have you no heart?" He called me: "Have you no heart? You're going to kill the poor old woman. Have you no heart? Think of what she's done for you and you are now willing to do this to her." I said, "What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you? He said, "Well, you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence." "Fuck you," I said, "Why should I do that? Why? You know, why should one do

that?" "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?" Well, he had the wrong man. Really, I mean, that's just not, not for me. And that's what Sidney Furst told me to do: "Jeff, don't make a fuss. Just be quiet about this. Don't sue anybody. Go home. Give Eissler some time. In a few years he's gonna be gone anyway. We Board of Directors, we'll give any anything you need. We're never going to cause trouble." It's not, you know, it's not, you know, my way of doing things. And it wasn't.

* * *

Tape 9 – Side A at 25:23-27:5

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MASSON: She [Anna Freud] never directly attacked me. On the phone she was quite gentle. I mean, she was honest. She said, "My father would never have wanted somebody like you living in this house," which is true I am sure. I understand that. She was upset. She felt that Eissler had lied to her, which he had – I don't know if he had, but he certainly hadn't been totally straightforward with her. Uh, she was upset because she knew that I was in possession of all these documents, and what would happen now? She probably felt that Eissler was making a mistake. At least, that's the impression I got. Then I agreed, right then and there, I told her, "I'm going to sue Dr. Eissler," and she didn't even object to it. And I did say, however, "I will, I will keep my promise not to publish all this material in such a way that will embarrass

you." I didn't want to say, "till you die." But I mean that was clearly –

MALCOLM: Yeah.

MASSON: – the implication.

MALCOLM: Yeah, yeah.

MASSON: And I kept that and to be quite honest, I must confess that I did give that up a few months ago on the grounds that I was told, and I don't want to say by whom because that really shouldn't be said, but I was told very – it's somebody who had heard it directly from her – that I should now be dropped from the Copyright. And I felt that that was unfair, that if she wanted to keep out of the whole thing, I could understand that, if she said, "Look, this is between you and Eissler or whoever, but I'm not involved, my relationship to you doesn't change," then I would retain, I would do for her what I said I would do.

MALCOLM: Um-hmm.

MASSON: But the minute that she, behind my back, started trying to get me off various committees and so on, that I didn't like and I felt that released me then from any obligation not to publish during her lifetime. And I was prepared, in fact, to go ahead with this publication in Germany with Suhrkamp, uh, no matter what effect it would have on her. And I knew it would have a devastating effect.

MALCOLM: But as it happened, she died.

MASSON: As it happened, she died.

* * *

———

Malcolm, Handwritten Notes

It was wrong of E to do that. He was constantly putting all kinds of moral pressure on me)

"Do you want to poison A.F.'s last days. Have you no heart? You're going to kill the poor old woman. Think of what she has done for you and you're now willing to do this to her.

What have I done? You're doing it. You're firing me. What am I supposed to do, thank you? Be grateful to you?

He said, well you could never talk about it. You could be silent about it. You could swallow it. I know its painful for you. But you could just live with it in silence. Fuck you. Why should I do that?

"Because it's the honorable thing to do, and you'll save face, and who knows, if you never speak about it, and you quietly and humbly accept our judgment, who knows if in a few years we don't bring you back. Well he had the wrong.

* * *

Malcolm Deposition at 445:5-23

* * *

[Q] Is it your testimony that is what Masson told you?

A That is what Mr. Masson told me.

Q Would you agree that the way you have written it would convey to the readers that mr. [sic] Masson was saying to you that he was not going to do the honorable thing?

MR. KENADY: Who is saying "The honorable thing"?

MR. MORGAN: Masson.

MR. KENADY: I think Eissler is saying it.

MR. MORGAN: No, Mr. Masson is saying he is not going to do the honorable thing.

A That is Dr. Eissler's comment.

Q Listen to my question. Are you not conveying to the reader by the way you have put those words together that Mr. Masson is saying I'm not going to do the honorable thing?

A Absolutely not. That is a misreading by you, Mr. Morgan, if that is what you believe.

* * *

Malcolm Deposition at 448:11-450:13

* * *

Q Mr. Masson was referring to Dr. Eissler's comments that if he doesn't speak about it and is quiet and humble, that maybe he would come back, get his job back; isn't that right?

A Well, the way I read it, when Mr. Masson says, "Well, he had the wrong man," he is referring to Dr. Eissler's comment that he be silent and that he would

swallow it and would live with it in silence. That was my interpretation, rather than he was somebody who was not honorable. That was my intention in writing this paragraph, as far as I can reconstruct my thinking

Q Was there some reason why you did not tell the reader that Mr. Masson said that Eissler said, "If you never speak about it and if you quietly and humbly accept our judgment, who knows, that in a few years, if we don't bring you back"?

A Well, I can't remember every decision to, you know, to not use the entire transcript, but I had – whatever reason I had for doing that, it was certainly not to impugn Mr. Masson's honor.

Q Will you agree, though, Mrs. Malcolm, that a reader reading it the way you wrote it could conclude that Mr. Masson is saying that Dr. Eissler had the wrong man if Dr. Eissler expected him to do the honorable thing?

A That is not my reading of it, no.

Q That is not my question.

MR. KENADY: She is entitled to tell you that.

MR. MORGAN: She is entitled to tell me that, but that is not my question.

A Ask me again.

Q Would you agree that a reader, reading your article, could conclude that when you wrote that Mr. Masson said, "~~He~~ had the wrong man," it was responding to Dr. Eissler's statement that it was the honorable thing to do?

A Your question is, could a reader come to that conclusion?

Q That's right.

A In my opinion do I think that a reader could come to that conclusion?

Q That is what I am asking you.

A Well, let me think about that. I think the reader would not conclude that.

Q Let's now go to page 117 of Exhibit 15.2.

Before I get to that, there is one more thing. Mrs. Malcolm, when you eliminated those words, you knew you were eliminating them, didn't you?

A I did.

Q This was done deliberately by you?

A Yes.

* * *

New York Times Book Review
Portrait of Masson July 8, 1984

To the Editor:

In my book "In the Freud Archives" I refrained from commenting on the frailties of its central character, Jeffrey Moussaieff Masson, and allowed him to speak for himself, in direct quotation. After reading Mr. Masson's comments in your Letters column (June 24), in which he attacks my integrity, I am obliged, in self-defense, to break my silence and point out that be suffers from a very poor memory.

Mr. Masson writes that the portrait of him in my book is based on "the few short hours Miss Malcolm and I spent together." The portrait, in fact, is based on more than 40 hours of tape-recorded conversations with Mr. Masson, which began in Berkeley, Calif., in November 1982, during a week of interviews, and continued on the telephone over the following eight months. In addition, it draws on interviews with 23 of Mr. Masson's friends, colleagues and professional acquaintances, with whom Mr. Masson himself suggested I speak in order to deepen my understanding of him. In his letter, Mr. Masson called my book "distorted." Any distortion I may have committed was a distortion by omission. Many of things [sic] Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The "almost" refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my

conversation with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare.

JANET MALCOLM
New York

Shawn Deposition at 27:4-28:4

• • •

I want you to tell me now what checking was done to satisfy anybody that Mrs. Malcolm was quoting accurately.

A I – I am the wrong person to ask that, I'm afraid.

Q Then all you can tell me is what you do or don't do?

A All that I know is that I was told that everything that was quoted from Mr. Masson – or is it Dr. Masson?

Q Mr. Masson is fine.

A Everything that was quoted was on tape, and that was my understanding from the very beginning.

Therefore, it made the checking much simpler from my point of view because, well, there were the tapes. she [sic] said they were all on tapes. If she told me that, I would know, since I trust her, that is the truth.

So, on quotations, I would say that if she told the checkers what she told me, that it is on tape, that would be the end of it.

Q Is your best recollection that she told you that everything was on tape?

A Yes, she did tell me. She said that she had everything on tape.

• • •

Malcolm Deposition at 188:2-6

• • •

Q Have you ever made that representation to anyone?

A That all of my quotes were on tape?

Q Yes.

A No.

• • •

Gottlieb Deposition at 46:8-18

• • •

Q Were you aware back in December of 1984 that Mr. Masson had contacted a lawyer who had called *The New Yorker Magazine* on his behalf regarding the piece that was published?

A I cannot remember at what date I first heard that.

Q But you did become aware of that fact?

A At some point.

Q Would you agree that you became aware of it before the book was published by Knopf?

A Yes.

• • •

Gottlieb Deposition at 52:10-17

• • •

Q Sure. Did you have a conversation with a lawyer or lawyers regarding Mr. Masson's claims before you decided to go ahead with the publication of the book?

A I would certainly have had a conversation about whether we felt secure in proceeding to publish after he had made his claims. I cannot remember whether I discussed what those claims were.

• • •

Gottlieb Deposition at 68:10-22

• • •

Q Were you aware that there was some complaint made regarding Janet Malcolm's conduct in the writing of the prior book or the piece?

A I don't know that there was a complaint about her conduct. I know that there was –

Q Were you aware that there was some complaint made against Janet Malcolm?

A Yes.

Q Did you talk to Janet Malcolm about the complaint?

A Undoubtedly I did.

Q Can you recall any of the discussion?

A No.

• • •

Gottlieb Deposition at 77:6-17

Q One of the things that I am not certain I feel that I have clarified. Are you able to tell me when was the first time that you becames [sic] aware that there was some dispute –

A I cannot remember the date.

Q – dispute arising?

A I cannot remember the date.

Q You had heard about Mr. Masson's attorneys calling before the publication of the book, hadn't you?

A I probably heard about it soon after it took place.

• • •

Galleys at page 2

• • •

Recently speaking of his first meeting with Masson (whose letters he now returns unread), Eissler said bitterly, "I realize now that there was something already wrong.

He doesn't answer Masson's letters, but he hasn't returned any (Handwritten in margin)

• • •

Galleys at page 38

• • •

She is Polish. She was in the Warsaw ghetto as a child. When we met, in Toronto, she was a very successful film producer for Canadian television. I persuaded her to quit her job and to study philosophy at the University. I got her interested in psychoanalysis, ~~I got her to go into analysis.~~

"a . . . Jew" (Handwritten in margin surrounding "Polish") –

"writing about" (Handwritten in margin before "psychoanalysis")

• • •

Galleys at page 39

• • •

She is Polish. She was in the Warsaw ghetto as a child. When we met, is Toronto, she was a very successful film producer for Canadian television. I persuaded her to quit her job and to study philosophy at the University. I got her interested in psychoanalysis, ~~I got her to go into analysis.~~

"a . . . Jew" (Handwritten in margin surrounding "Polish")

"writing about" (Handwritten in margin before "psychoanalysis")

Where did this come from? (Handwritten in margin)

• • •

Franklin Deposition at 53:2-25

* * *

Whose writing is that?

A In red?

Q Yes.

A Gardner Botsford's handwriting.

Q What is he asking about there?

A He is asking me where I got that information from.

MR. KENADY: What is that information?

THE WITNESS: Well, Janet had written, "She is Polish." I changed it to, "She is a Polish Jew."

There is another change further down on the page. Janet wrote, "I got her interested in psychoanalysis. I got her to go into psychoanalysis." I changed it to, "I got her interested in writing about psychoanalysis, and for many years we worked together and read the analytic literature, et cetera."

* * *

Tape 11 – Side A at 19:13-20

* * *

MASSON: Well, I mean, I suppose in some sense I am. But, I mean, I'm certainly interested in stuff like what I.F. Stone was doing –

MALCOLM: Yeah.

MASSON: – about the Vietnamese war. I thought that was magnificent. Just great stuff. And that was journalism at it's [sic] best. And I think your thing about the impossible profession is the same kind of thing.

* * *

Tape 4 – Side B at 50:21-24

* * *

[MASSON:] Because I think you're right to, to – One, one doesn't want to avoid either the personal side about me and my whole life nor the side connected with my discoveries. Um, you know, there is no reason to stay away from anything, really

* * *

Tape 1 – Side A at 28:14-29:18

* * *

MALCOLM: I mean, what was the idea of your su:t?

MASSON: Well, uh, that I was wrongfully fired, and fired in order to suppress certain documents.

MALCOLM: But I mean –

MASSON: That there was a tort.

MALCOLM: – I thought you had, you had to show them that you had been somehow damaged in some way, to prove a case?

MASSON: Sure, I mean, they did damage my reputation.

MALCOLM: I see, so that was the case.

MASSON: I mean, I became a *persona non grata* –

MALCOLM: Yeah.

MASSON: – in the anal – Which is true. In the analytic community. Can't get a job. Not even in the university, and it's weird to see how the university and analysis, this whole thing – they all sort of hang together. "Well," you know, "we're really very interested in your ideas, but you're very controversial at this time and we think it would be better to wait until – It's really, I can't get a job. I mean –

MALCOLM: Now, you told me that you were just fired yesterday from your job here at the university, too?

MASSON: No.

MALCOLM: You lost your job or – ?

MASSON: No, no, I resigned from my position at Toronto. I was professor of Sanskrit. And I resigned to take on the position with the Archives. And I couldn't get it back.

MALCOLM: But what about your work with the University here?

MASSON: It's honorary. I don't get a salary. I have an honorary position in Sanskrit [???] but I don't get a salary. But I do lectures once in a while with some students.

MALCOLM: So, so you, you live off your publications?

MASSON: My future publications.

• • •

Tape 13 – Side B at 44:5-9

• • •

MASSON: Also, how would I live for a year? I mean this way I've got a contract because I've got a book promised, but if I said I need another year, there's nobody going to give me a grant. I can't get a job. I can't teach in the university uh – and I can't see patients. So what would I do?

• • •

Tape 3 – Side B at 59:1-9

• • •

MASSON: That's true, yeah. No, I think that the reason you give me is absolutely correct. That you don't want to be influenced by anything I'm feeling. You're right. I mean, why should you? I should have no control over what you say because then it's not honest. I, I think, you know, that's absolutely true. But, if in, if I were in your shoes, I would say: Well, sure, I'm not going

to change a single thing that I feel because of what you feel. But here's what I'm saying. Now you can do what you want about it.

* * *

Tape 3 – Side B at 60:6-62:28

* * *

MASSON: That's right. I know that, you do – I really do have faith in this. I really believe that you're going to write something very interesting, that I will not agree with all of it but I will agree with lots of it, and that I will think it's great.

MALCOLM: Well, that's what I hope.

MASSON: I'm sure of it and I'm not, you know, I'm not an ungenerous person that way. I mean, I'm not like – just because you don't agree with me, I'm not going to say: Oh, this is no good. I really will acknowledge it.

MALCOLM: Yeah.

MASSON: I just got, suddenly got worried from that letter and thought: What if this really is about Masson and Swales? That would be horrible.

MALCOLM: Yeah.

MASSON: Because it wouldn't correspond to the truth. Not because it's, you know, that's all.

MALCOLM: I understand. But I'm glad we've had this, this talk about Swales. Because, you know, I've been sort of I – I hesitated to press you about it because I knew it was an unpleasant subject for you, but it was a sort of a bit of a lacuna about –

MASSON: Sure.

MALCOLM: – your feelings were so –

MASSON: Well, look, don't hesitate to press me about anything. I mean, there should be nothing – I really don't feel that anything in my past should be hidden; there is nothing, you know, I mean, there are a couple of details about my relationship with Eissler and Muriel Gardiner that really, because of them, I could not reveal. Obviously –

MALCOLM: Of course.

MASSON: But that's only because of them. I, you know, would have absolutely no hesitation in, you know, I feel that everything I've ever done and talked about or thought or believed should be open. I really strongly believe that.

MALCOLM: Yeah, yeah.

MASSON: But I can't, you know, and to the extent that it doesn't harm anyone, I'm perfectly prepared to say anything –

MALCOLM: Yeah, well, I, I –

MASSON: – including my sexual feelings for you.

MALCOLM: [laughs]

MASSON: But I'm, I'm, I you know, I can't obviously talk about things that would hurt Eissler or Muriel Gardiner. I mean, I told them once I would never do that, not even in my lawsuit, and I wouldn't do it with

you and I won't and, you know, because that would hurt another person.

MALCOLM: Of course, yeah, and I, I mean, this is not the sort of material I would be interested in anyway.

MASSON: Obviously not, no. No, but I feel I've certainly probably told you more than I've ever told anyone else, you know, except Terri, when I was living with her, about the sort of the things I've thought and felt and that have happened to me and so on. And I think that's right. You know, I think you've also, I mean, quite apart from the fact that I like the way you write and like the way you tell things, I also think you do have a certain remarkable listening gift. You know, you have a slightly skeptical air to your listening which is encouraging.

MALCOLM: Um-hmm.

MASSON: I mean, it encourages one to talk and I like that.

MALCOLM: Yeah, well I think we have a good sort of a –

MASSON: Yeah, I do. I think we have a good relationship and I really don't want it disturbed, and I'm sorry now that I ever talked to what's-her-name? But I, I think it was a mistake in retrospect, but it's one that's over and I can't do anything about. But I really feel that I've committed myself to you and, I mean, there is nobody that knows more about this than you. Nobody knows anything, really. And, uh, so I have a stake in this as well. I really want this to be as complete –

MALCOLM: Yeah.

MASSON: And I'm sure it will. And I'm sure it's going to interest a lot of people; it's going to be great. So, you mustn't hesitate; if you think there's something that you feel that there is some sort of secrecy about, please feel comfortable –

MALCOLM: Yeah, well, I didn't feel, certainly "secrecy" is never the right word about anything that –

MASSON: No but, if you feel any hesitation in me in areas that you'd like to know more about, God, just ask.

• • •

Tape 8 – Side B at 45:23-25

• • •

MASSON: I really did have the fantasy two or three days before that: "Why doesn't Janet Malcolm from *The New Yorker* call me?"

• • •

Tape 8 – Side B at 46:19-21

• • •

MASSON: – "she's saying all these wonderful things." You know, it will have a certain tone of objectivity. Uh, it will have a certain, even a slight negative tone –

• • •

Tape 8 – Side B at 47:14-24

• • •

MASSON: No, I realize that but you see there is an advantage to that. If you saw it the way I saw it,

there's no way you could write about it in a way that would be anything but an apology, *pro vita mia*, which is not what is needed now. I can do that myself. I see it my way. [laughs] I can write my own book and I can write it with a lot of verve and a lot of passion and get everything straight. It won't have the same effect. Your slight detachment and slight ironical tone, or however it's going to come out in the book, is good, I think. Because it allows the reader to make up his own mind, as long as you get the story straight.

* * *

Tape 4 – Side A at 8:14-9:5

* * *

MASSON: Why would I ever sue either Eissler or *The New Yorker*? I mean, isn't he aware that he fired me from a job with no reason whatsoever. I mean, he can say anything he wants about me.

MALCOLM: Of course.

MASSON: I don't care what he says.

MALCOLM: Well, he was very interested in what you, in what you had said about him, and I said, "Well, let's, let's talk about it," and then I, then we left it that you first get the letter so I, after my phone conversation with the lawyer, I, I wrote Eissler a note.

MASSON: Yeah.

MALCOLM: Telling him what the lawyer had said and, and then telling him that it would be to his interest to, to speak to me and to hear what you had said so that he could give his side.

MASSON: Yeah, well, if you want, I mean, you know, if it comes to that and you need some letter from me saying that I'm not going to sue either *The New Yorker* or Dr. Eissler on the basis of what you write, I'll give it to you. I don't care.

* * *

Masson Deposition at 23:5-24:26

* * *

Q. What about during the passage from the Claremont to Chez Panisse, how was that accomplished?

A. In my car there was no tape recorder.

Q. There was no tape recorder?

A. No.

Q. You didn't maintain silence, did you?

A. No, we chatted.

Q. I take it there were very few silent periods when you and Janet were together?

A. That's correct.

Q. Did you also take walks with Janet Malcolm while you were in Berkeley?

A. I don't believe we did, no.

Q. Did you ever take walks with Janet Malcolm anywhere that you recall?

A. Well, when you say "take walks," we certainly walked from place to place.

Q. I had in mind what I would guess you would call a recreational walk where you'd just go around the block or something without any definite destination in mind except perhaps to go and return.

A. No, I don't believe we did.

Q. Do you remember walking with Janet Malcolm then –

A. Well, certainly we – I'm sorry, I should wait.

Q. – (continuing) while you were both in Berkeley?

A. Yes, we had one stroll with Denise and my daughter and Denise's daughter in Chinatown for a couple of hours. We had dinner in Chinatown, and then we wandered about, and that was all together.

Q. All right. Was Janet toting the tape recorder?

A. Yes, she was.

Q. Was it continuously on while you were going to Chinatown in the car?

A. No.

Q. Was it continuously on while you were having dinner in –

A. – (continuing) in Chinatown, no.

Q. It was not on?

A. No.

Q. Was it on while you were walking around the vicinity of Chinatown?

A. No. No, she explained to me, I think in the Claremont that she intended to tape every formal conversation that she and I would have together, and that there would be, I believe, a few other occasions if other people were present that she would record as well.

* * *

Masson Deposition at 47:4-8

* * *

Q. Berkeley. So, there were occasions when you were speaking together in Berkeley other than when you were riding in an automobile with other people when the tape recorder was not on?

A. That is correct.

* * *

Masson Deposition at 65:4-8

* * *

Q. Over the course when you had been with Janet Malcolm in Berkeley, did you observe her taking notes as opposed to turning the tape recorder on and off?

A. I did not, no. But evidently she did take notes because she's handed some of them over to us.

* * *

Berkeley, May 17, 1983

Dear Janet: . . .

Denise and I would like to thank you, and Gardner, for a wonderful stay. You were both very kind and we enjoyed it enormously. I found it particularly interesting, once again, to see our interaction. It is curious how different our views are, and yet, how at the end of things, or after long talks, we come to understand one another better. I come up against your "dispassion" or objectivity, or whatever you want to call it. I cannot understand why you don't become more exercised, and you wonder what all the fuss is about. I can't believe your coolness is genuine, and you are suspicious of my engagement. You saw why I wouldn't like the Eissler book, but for you a few sentences would suffice. I was all in a passion. Is it just a question of professions? Is it just an exterior difference? I really don't know. But it certainly makes things less than dull.

I have been thinking about your question, what I want (vis a vis Eissler) and I remember telling you that I did, in some sense, want vengeance. But I realize now that I used the wrong word. That is not what I meant at all. What I meant was that I wanted vindication, that is, I wanted Eissler (or anybody else) to see what the real issues were about. If he wanted to fire me, he was free to do so, but not over something, that really wasn't at issue. Eissler could care less, in the end, about the profession of psychoanalysis, or publicity, or even therapy. Something much more critical was at issue for him, and over that he was willing to give up even a close friend. If he could say that openly, then I would have no quarrel. What made me

angry, and still does, is the hypocrisy. Pretending it is a scientific issue when it is a political one. Pretending I did something dishonest when I simply talked about what was true.

The Schur material I have is all in German. I can't lay my hands on any Ingalls articles, but if it is important, let me know, and I will find them in the library (probably easier forme [sic] to do than you). I am sending you the book we edited in his honor, which gives the list of his publications. Also three books I wrote, a long time ago. Sending it all off today – you should have it soon. . . .

* * *

Masson Deposition at 65:24-66:27

* * *

A. Well, it was breakfast time. I came down a little bit early the first day because Janet Malcolm had given me a book that Eissler had just written and published, which I had not yet received. It had just come out that week. She had a copy and was curious to tell how I would respond to it.

So, she gave it to me the evening before and I spent most of the night staying up reading that book because I was fascinated.

And I went down early, since I had slept very little, and I was very keyed up and wanted to talk about this book.

So I went down early and Janet Malcolm was there starting to get breakfast ready. So, she asked me what I

was doing up so early and I said, "Well, I'm so upset about this book I'd like to talk to you about it."

So, we sat down at the breakfast table, had a fairly expansive half an hour to an hour discussion about the book, and then Denise joined us, and then Gardiner Botsford.

And Denise said, "What's all the fuss?"

And I said, "Well, we're arguing about this book, and I can't understand why Janet Malcolm is not more excited about it, and she can't understand why I am so excited."

Q. What was the book?

A. It was called Victor Tausk Suicide, and it was Eissler's second book on the topic.

Q. And would you spell Tausk?

A. T-a-u-s-k. And I felt –

MR. MORGAN: Wait a minute. He just wanted to know what the book was.

MR. KENADY: Q. Have you given us the title?

A. It was called Victor Tausk Suicide.

Q. How long a book was it?

A. 200 pages, 250 pages.

* * *

Masson Deposition at 67:8-68:19

* * *

Q. Were you in what could be called an exuberant mood at this time knowing that your book was going to

be published finally in English by a well-known publisher and that you had been chosen to address all of the sales people?

A. I knew well before that that the book was going to be published.

Q. But you said you were invited to address a gathering at Farrar. What was the gathering and the purpose of your address?

A. It was a sales conference.

Q. That's what I thought.

A. And these are the salesmen who sell the book.

And at this stage, they were now going to go out and attempt to sell the books, and Farrar, Straus and Giroux wanted me, because it was a fairly complicated story, wanted me to explain to them the significance of this book so they could explain it to book sellers. I was not particularly exuberant, no.

Q. Well, it was a meeting where you exhorted the troops in a way, wasn't it?

A. Well, they did that. What they wanted to hear from me is they wanted to hear something of the discovery process so that they could then relay it.

Q. And were there predictions of what its success would be?

A. They thought it would do quite well, yes.

Q. What would that have meant in terms of money to you? I'm just trying to get an appraisal of what you understood from "quite well."

A. Well, I understood that they were printing at that point 35,000 copies. So, that would have meant a considerable amount of money for me if they were all sold and if they went into a second printing, which they certainly hoped to be able to do fairly quickly.

And they were hoping that they would sell it to book clubs and so on. so [sic], they were optimistic about the book, although they recognized that it was a book for the general public not for analysts.

Q. When you say "a considerable sum," what sum do you have in mind?

A. Well, if all 35,000 copies sold, I would have gotten $50,000.

* * *

Malcolm Deposition at 56:5-57:19

* * *

Q How would it be determined as to what articles you would write for *The New Yorker Magazine* in the eighties?

A I would speak to Mr. Shawn about them and he would either say, "Yes, that's fine, go ahead," or he would say he didn't think that was a good idea.

Q We were talking about during the 1980's. You would go to Mr. Shawn and you would suggest a particular article you wanted to write on; is that correct?

A Correct.

Q In the 1980's, how many staff writers were there for *The New Yorker Magazine*?

A I have no idea.

Q Are we talking about more than ten?

A Yes.

Q Did other staff writers operate in the same manner as you, in that they would go to the editor and say, "I would like to write on a particular article"?

A As far as I know, they did.

Q How many articles would you write a year in let's say 1980, '81, '82 for *The New Yorker Magazine*?

A No more than one; sometimes it took me longer than a year to prepare and write an article.

Q How was your compensation determined? Were you paid by the article or on a regular monthly basis?

A I was paid when I finished the article.

Q Were you paid a particular amount per article?

A Yes.

Q Did it vary with the articles?

A Yes.

Q How was the compensation determined?

A By the whim of the editor.

Q In other words, he would look at an article and say that, "I think the article is worth X amount of dollars"?

A Presumably.

* * *

Malcolm Deposition at 64:19-65:8

* * *

Q As a staff writer for *The New Yorker Magazine*, are you required to write at least one article a year?

A No.

Q The determination is solely yours, whether you do or do not write?

A Correct.

Q Is there any distinction as far as *The New Yorker Magazine* is concerned between being a staff writer or a free-lance writer?

A No – I don't know what it is.

Q Are you required to spend any amount of time per year on working on articles for *The New Yorker Magazine* in order to be a staff writer?

A No.

* * *

Franklin Deposition at 43:14-18

* * *

A Well, I am sure I came to the conclusion in my work on this piece that there was nothing suspicious about that. It seemed like a reasonable thing from the kind of letters and documents that I was looking at while I was checking the piece.

* * *

Franklin Deposition at 61:2-9

* * *

[W]e would have changed that kind of thing, but no, he never – he, at the end of our conversation there was nothing left unresolved and he never complained to me one single time about any inaccuracies.

Q In other words, he did not say to you, "If she got that wrong," meaning about his wife, "will you please check the other things she says about me?"

A He absolutely never said that to me.

* * *

Franklin Deposition at 64:17-23

* * *

Q At or about that time or during that conversation did Mr. Masson ask you to read the other quotes to him?

A You mean all of the other quotes in the piece, did he ask me to read them?

Q Yes.

A No.

* * *

Masson Deposition at 292:1-25

* * *

The Michaels' report to you, did it mean that Gotlieb [sic] had admitted that there were falsehoods?

A No.

Q Of which he was aware?

A No, not at all.

Q In the book or article?

A Only that he knew that I claimed that.

Q I see.

A And I suspect he believed Janet Malcolm. He probably asked her – after all, they see each other.

MR. MORGAN: Don't do all that speculating.

MR. KENADY: Q. So, we are not to understand that the report from Professor Michaels to you conveyed in any sense an admission by Mr. Gotlieb [sic] that he had knowingly published a falsehood, but you –

A Certainly not.

Only that he knew – maybe I missed – what I meant to say when I said, "I know, I know," he didn't mean that he knew that the article contained falsehoods, he meant, "I know that Masson disputes the accuracy of the quotations, I know about that."

Q I see.

A No, certainly I don't believe Mr. Gotlieb [sic], if he knew that they were false, would have gone ahead and published it. I think he was negligent in not finding out, but not dishonest.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[686 F. Supp. 1396]

[No. C-84-7548 EFL; August 17, 1987]

JEFFREY M. MASSON,
Plaintiff

v.

THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM
Defendants

ORDER GRANTING SUMMARY JUDGMENT

This document appears as Appendix B to the Petition for Writ of Certiorari.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, vs. THE NEW YORKER MAGAZINE, Inc.; ALFRED A. KNOPF, Inc.; JANET MALCOLM, Defendants.	No. C-84-7548 EFL JUDGMENT FILED AUG 17 1987

Pursuant to the Order Granting Summary Judgment of this date, the Court hereby renders judgment in favor of the defendants with each side to bear their own attorney's fees and costs.

DATED: August 14, 1987.

/s/ Eugene F. Lynch
EUGENE F. LYNCH
United States
District Judge

CHARLES O. MORGAN, JR.
450 Sansome Street
Suite 1310
San Francisco, CA 94111-3382
Telephone: 392-2037

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, vs. THE NEW YORKER MAGAZINE, Inc.; ALFRED A. KNOPF, Inc.; JANET MALCOLM, Defendants.	No. C-84-7548 EFL NOTICE OF APPEAL SEP 11 1987

Notice is hereby given that JEFFREY M. MASSON, the Plaintiff above named hereby appeals to the United State Court of Appeals for the Ninth Circuit from the Summary Judgment entered in this action in favor of the Defendants on August 17, 1987.

Dated: September 10, 1987

/s/ Charles O. Morgan
CHARLES O. MORGAN, JR.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[895 F.2d 1535]

[Nos. 87-2665, 87-2700, August 4, 1989]

[As modified February 15, 1990]

JEFFREY M. MASSON,
Plaintiff/Appellant/Cross-Appellee,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., AND JANET MALCOLM
Defendants/Appellees/Cross-Appellants

OPINION

This document appears as Appendix A to the Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Nos. 87-2665, 87-2700; February 15, 1990]

JEFFREY M. MASSON,
Plaintiff/Appellant/Appellee

v.

THE NEW YORKER MAGAZINE, INC.;
ALFRED A. KNOPF, INC.; JANE MALCOLM
Defendants/Appellees/Appellants

ORDER

This document appears as Appendix D to Petition for Writ of Certiorari.

MICHAEL BROOKS CARROLL
JONATHAN H. KROTINGER
CARROLL, WELLER & HAINES
601 Montgomery Street, Suite 2000
San Francisco, California 94111
Telephone: (415) 788-7600

Attorneys for Plaintiff
Jeffrey M. Masson

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFREY M. MASSON, Plaintiff, v. THE NEW YORKER MAGAZINE, INC.; ALFRED A. KNOPF, INC.; JANET MALCOLM, Defendants.	No. 84 7548EFL COMPLAINT FOR DEFAMATION AND INVASION OF PRIVACY [JURY TRIAL DEMANDED]

Plaintiff complains and alleges as follows:

JURISDICTION

1. Plaintiff JEFFREY M. MASSON ("Masson") is a citizen of the State of California who resides in this judicial district.

2. Defendant THE NEW YORKER MAGAZINE, INC. ("The New Yorker") is a New York corporation with its principal place of business at New York, New York.

3. Defendant ALFRED A. KNOPF, INC. ("Knopf") is a New York corporation with its principal place of business at New York, New York.

4. Defendant JANET MALCOLM is a citizen and resident of the State of New York.

5. This Court has jurisdiction over the subject matter of this action in that the Plaintiff and Defendants are of diverse citizenship and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

6. Venue is proper in this Court because Plaintiff resides in this judicial district and the claim which forms the subject-matter of this action arose in this judicial district.

FIRST CAUSE OF ACTION

(Against Defendant MALCOLM for Defamation)

7. Plaintiff JEFFREY MASSON is a Sanskrit scholar and psychoanalyst who formerly served as projects director of the Sigmund Freud Archives. Over the course of several years, beginning around 1972 and continuing until around 1982, MASSON became the associate and confidante of persons prominent in the international psychoanalytic community, among them Dr. Anna Freud, Sigmund Freud's daughter, and Dr. Kurt Eissler, Secretary of the Sigmund Freud Archives. MASSON's association with these and other persons and his subsequent appointment as projects director of the Freud Archives gave him access to previously unpublished documents

pertaining to the history of psychoanalysis, including much of Sigmund Freud's personal correspondence.

8. Over the course of many years and particularly after he gained access to Freud's personal correspondence in his capacity as projects director of the Freud Archives, MASSON developed an original and (to members of the psychoanalytic "establishment") highly unorthodox theory concerning the origins of psychoanalytic thought. In particular, MASSON's research focused on the historical prominence of the so-called "seduction theory".

9. MASSON's research gradually revealed that Freud did not abruptly abandon the "seduction theory" in the Autumn of 1897 as previous scholarship had indicated. MASSON uncovered clear and previously undisclosed evidence of Freud's ongoing interest and belief in the "seduction theory", which holds that neurotic personality disorders originate in actual sexual abuse during childhood. MASSON's research further revealed that Freud turned his back on the seduction theory in favor of a theory more pleasing to his colleagues' sensibilities. Freud's subsequent theory held that neuroses originate in unconscious fantasies and not in actual sexual abuse at the hands of a parent or other authority figure.

10. MASSON's scholarly research led him to conclude that Freud abandoned the "seduction theory" not as a result of clinical observations, but to further his career and to placate his colleagues.

11. MASSON published his views in 1984 in a book entitled THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY.

12. On information and belief, MASSON's views were so unorthodox that they were perceived as a threat to the psychoanalytic "establishment." MASSON is informed and believes that, for this reason, members of this establishment and persons with connections thereto had a vested interest in discrediting MASSON and his views.

13. Thus, when Defendant MALCOLM, a writer with close ties to the psychoanalytic "establishment," wrote an article concerning MASSON for THE NEW YORKER which is the subject matter of this complaint, she focused it not primarily on MASSON's scholarship or the research behind his work, but instead primarily on MASSON's personal life. During the later part of 1983, MALCOLM traveled to MASSON's home in Berkeley, California and conducted a series of interviews with him, which were tape-recorded and which formed the basis for the aforesaid article. Defendant MALCOLM spoke to other persons personally and professionally associated with MASSON, and published her purported findings in a novella-length article in successive issues of THE NEW YORKER, the first of which was dated December 5, 1983. Defendant THE NEW YORKER has represented to counsel for Plaintiff that the first publication of such article occurred on November 30, 1983. MALCOLM subsequently published said article in substantially identical form in book format under the title IN THE FREUD ARCHIVES, published by Defendant KNOPF.

14. Defendant MALCOLM's article in THE NEW YORKER, subsequently republished in book form by KNOPF, expressly purported to be based on many hours of tape-recorded interviews with MASSON as well as on

the author's personal impressions and independent research. Many parts of the article (subsequently published in book form) purported to include extensive verbatim quotations from MASSON. In fact, many of the so-called "quotations" failed to correspond to the tape-recorded words of MASSON and were quoted out of context. Thus, Defendant MALCOLM's quotations constituted misstatements by Defendant MALCOLM of what MASSON had actually said during his interviews with her or constituted willful distortions of what MASSON had intended as the meaning of his statements. On information and belief, Defendant MALCOLM knowingly and deliberately failed to adhere to the tape-recorded record of her interviews with MASSON. On information and belief, Defendant MALCOLM instead knowingly and deliberately misstated MASSON's words and took his words out of context in the attempt to portray MASSON, using words purportedly out of his own mouth, as unscholarly, irresponsible, vain, lacking in personal honesty and moral integrity, and thus motivated by personal considerations in his professional dispute with members of the psychoanalytic establishment and therefore unsuited for any academic or professional position requiring personal responsibility, integrity and credibility. On information and belief, Defendant MALCOLM also sought to enhance the gossip appeal of her own story, thereby increasing its marketability and profit potential, by making MASSON appear to impugn his personal and professional integrity with his own words.

15. Defendant MALCOLM intentionally and deliberately misstated and misquoted MASSON's words in

numerous ways, including but not limited to the following respects:

a. Defendant MALCOLM purports to quote MASSON as saying that, if he were to become head of the Freud Archives, a position which was to carry with it residence in Sigmund Freud's house in London, he would turn the house into a place of "sex, women, fun." In truth, MASSON never said such.

b. Defendant MALCOLM purports to quote MASSON as having said that his appointment as director of the Freud Archives would make it a "traumatic experience for American analysts to see a young guy like [MASSON] lounging around Anna Freud's house and running around with hundreds of Freud letters sticking out of his pockets." In truth, MASSON never said such.

c. Defendant MALCOLM portrays MASSON as admitting his own lack of honor by purporting to quote MASSON as having said that Dr. Eissler "had the wrong man" when Dr. Eissler asked MASSON to do the "honorable thing" by living "in silence" with his (MASSON's) firing from his position with the Sigmund Freud Archives. In truth, MASSON clearly only indicated to Defendant MALCOLM that he (MASSON) was not a man to keep silent about his termination.

d. Defendant MALCOLM purports to quote MASSON as having said that psychoanalysts "will crawl" to him once his book THE ASSAULT ON TRUTH was published, and that: "They will want me back, they will say that MASSON is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived." In truth, MASSON never said such.

e. Defendant MALCOLM purports to quote MASSON as having said that analysts "sensed that I could single-handedly bring down the whole business and, let's face it, there's a lot of money in that business. And they were right to be frightened, because what I was discovering was dynamite." In truth, MASSON never said such.

f. Defendant MALCOLM purports to quote MASSON as having said that he changed his middle name to Moussaieff in 1975 because "it sounded better." In truth, MASSON never said such.

g. Defendant MALCOLM purports to quote MASSON as having said that there were "hundreds of articles on the positive effects of sexual seduction." In truth, MASSON never said such.

h. Defendant MALCOLM purports to quote MASSON as having told "The *Times*, *Time*, and *Newsweek*" the day after the meeting of the Board of the Sigmund Freud Archives during which MASSON was terminated that "Dr. Eissler forced me to promise him that I would not reveal anything that happened at the meeting [during which MASSON was terminated]. I'm sorry, gentlemen, that I have to go back on my word, but I will not be bound by such a promise." In truth, MASSON never said such. Instead, MASSON told Defendant MALCOLM that (a) he had told the members of the Board at said meeting that he would not be bound by any promise not to speak to the press and (b) that a member of the Board had defended MASSON's right to speak to the press.

i. Defendant MALCOLM purports to quote MASSON as having said that "analysis stands or falls with me now." In truth, MASSON never said such.

15. In falsely attributing the aforesaid quotations and statements to MASSON, Defendant MALCOLM acted intentionally and with reckless and deliberate disregard for whether or not such quotations and attributions were true and accurate.

16. In addition to the aforesaid deliberately false and/or out-of-context attributions and misquotations, Defendant MALCOLM deliberately omitted from her account statements made by MASSON, which omissions rendered the context in which MASSON spoke false and misleading. Said omissions included (without limitation) Defendant MALCOLM's false statement that "At no time during our acquaintance did MASSON answer my question about what had brought on his sudden virulent anti-Freudianism." Defendant MALCOLM omitted to state that MASSON had answered her question at length to explain the reasons for which his views about Freud had changed over time. Rather, Defendant MALCOLM attempted to portray MASSON as evasive and intellectually dishonest. On information and belief, Defendant MALCOLM acted intentionally and recklessly in making the aforesaid omissions.

17. As a proximate result of publication of such false and knowingly inaccurate misstatements and misquotations, and of such deliberate omissions, MASSON has been exposed to hatred, contempt, ridicule and obloquy by other members of the psychoanalytic and academic communities as well as the general public, all to his general damage in an amount not yet ascertained but in any event not less than $100,000. As a further proximate result of the aforesaid misquotations and omissions, MASSON has been injured in his occupation, all to his

special damage in an amount not yet ascertained but in any event not less than $100,000.

18. In making the aforesaid false and deliberately inaccurate misstatements and misquotations, and the aforesaid deliberate omissions, Defendant MALCOLM acted with knowledge of their falsity or with deliberate and reckless disregard of their truth or falsity, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

SECOND CAUSE OF ACTION

(Against Defendant THE NEW YORKER For Defamation)

19. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1-18, above.

20. In republishing the false quotations and attributions contained in Defendant MALCOLM's articles, Defendant THE NEW YORKER published statements it knew to be false or published them with reckless and deliberate disregard of whether or not they were true or false.

21. As a proximate result of said false publications, MASSON has been exposed to hatred, contempt, ridicule and obloquy in the eyes of the psychoanalytic and academic communities and of the general public and he has been injured in his occupation, and has suffered general and special damages in an amount not yet ascertained but in any event not less than $100,000.

22. In making the aforesaid false publications, Defendant THE NEW YORKER acted knowingly or with deliberate and reckless disregard of the truth or falsity of said publications, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

THIRD CAUSE OF ACTION

(Against Defendant KNOPF For Defamation)

23. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1-22, above.

24. In republishing the false quotations and attributions contained in Defendant MALCOLM's book IN THE FREUD ARCHIVES, Defendant KNOPF published statements it knew to be false or published them with reckless and deliberate disregard of whether or not they were true or false.

25. As a proximate result of said false publications, MASSON has been exposed to hatred, contempt, ridicule and obloquy in the eyes of the psychoanalytic and academic communities and of the general public and he has been injured in his occupation, and has suffered general and special damages in an amount not yet ascertained but in any event not less than $100,000.

26. In making the aforesaid false publications, Defendant KNOPF acted knowingly or with deliberate and reckless disregard of the truth or falsity of said

publications, and MASSON is entitled to an award of punitive damages.

WHEREFORE, MASSON prays for judgment as more fully set forth below.

FOURTH CAUSE OF ACTION

(Against All Defendants For Invasion of Privacy)

27. MASSON incorporates by this reference as if fully restated herein, the allegations contained in paragraphs 1 through 26, above.

28. Beginning with the publication of its December 5, 1983, issue, Defendant THE NEW YORKER, without MASSON's consent, invaded MASSON's right to privacy by publishing an article written by Defendant MALCOLM concerning MASSON containing detailed but distorted accounts of MASSON'S personal, family and home life, including descriptions of MASSON's ex-wife and his relation with her, MASSON's daughter and his relations with her, MASSON's girlfriend and his relations with her, and various persons with whom MASSON has been personally and/or professionally associated during his life. Said matters were republished by Defendant KNOPF in book form under the title IN THE FREUD ARCHIVES.

29. MASSON was not given an opportunity to learn of the matters contained in Defendant MALCOLM's article until after the first publication thereof in THE NEW YORKER, and was shocked and offended when public disclosure of the private details of his life and personal relations were revealed to the readership of THE NEW

YORKER. MASSON had been informed by Defendant MALCOLM and believed that the article she was preparing about him concerned his theories about psychoanalysis and his career as a psychoanalyst and was not intended to be an expose of his private life.

30. The purported facts disclosed about MASSON by Defendant MALCOLM in THE NEW YORKER and by Defendant KNOPF in MALCOLM's book IN THE FREUD ARCHIVES were private facts which MASSON desired to keep private and which he reasonably expected would be kept private.

31. The disclosure by Defendants of the aforesaid facts was offensive and objectionable to MASSON and to a person of ordinary sensibilities. No legitimate public concern is served by disclosure of the private details of MASSON's personal life, especially when those facts have little or no relation to the substance and merits of MASSON's theories concerning psychoanalysis, except insofar as they tend to disparage and discredit MASSON personally and thereby purport to impugn his scholarship through personal character assassination.

32. The aforesaid disclosures and deliberately false and out-of-context misquotations by Defendants created publicity in the sense of a public disclosure to the readership of Defendant THE NEW YORKER and of Defendant MALCOLM's book IN THE FREUD ARCHIVES published by Defendant KNOPF, which publicity placed MASSON in a false light in the public eye by incorrectly portraying MASSON as a person unsuited for academic or professional responsibility because he lacked personal and professional honesty, integrity and responsibility.

33. As a proximate result of the aforesaid disclosure of private facts, and of the aforesaid "false light" publicity, MASSON has been exposed to hatred, contempt, ridicule and obloquy, has suffered loss of reputation and standing in the community at large and in the psychoanalytic and academic communities in particular, all of which has caused him, his family and his friends humiliation, embarrassment, mental anguish and suffering, all to his general damage in an amount not yet ascertained but in any event not less than $100,000.

34. As a further proximate result of the aforesaid public disclosure of private facts, and of the aforesaid "false light" publicity, MASSON has been injured in his trade and business, in that he has been impaired in his professional career and has lost earnings and opportunities for employment, all to his special damage in an amount not yet ascertained but in any event not less than $100,000.

35. In making the aforesaid disclosures of private facts, and creating the aforesaid "false light" publicity, Defendants and each of them were guilty of oppression, fraud and malice, in that Defendants acted with a conscious disregard of MASSON's rights and with the intent to exploit private details of MASSON's personal life in order to sensationalize the circumstances in which Plaintiff developed his theories concerning psychoanalysis. MASSON is therefore entitled to an award of punitive damages in an amount not less than ten million dollars ($10,000,000).

WHEREFORE, MASSON prays for judgment as follows:

1. For general damages in an amount not yet ascertained but in any event not less than $100,000.

2. For special damages in an amount not yet ascertained but in any event not less than $100,000.

3. For punitive damages in an amount not less than ten million dollars ($10,000,000).

4. For costs of suit herein, including a reasonable attorneys' fee.

5. For such other and further relief as the Court deems proper and just.

JURY DEMAND

Plaintiff MASSON demands trial by jury on all causes of action in this Complaint.

Respectfully submitted,

CARROLL, WELLER & HAINES

DATED: November 29, 1984

By:/s/ Michael Brooks Carroll
Michael Brooks Carroll
Jonathan H. Krotinger
Attorneys for Plaintiff
JEFFREY M. MASSON

MALCOLM Deposition at 313-4-23

• • •

A "As I came to realize, it was not the right question – as is probably the case with all unanswerable questions," and then let's put three dots there, and the quote continues: "If Masson is silent about – and possibly ignorant of – the motive for a psychoanalytic volte face. He was anything but reticent – this is not to my point anymore." You can end the quote there, after the three dots.

I am talking about my understanding of Mr. Masson's positions, not anything more literal than that. That is what I am trying to say with my answer.

Q When you say to the readers, "As I came to realize, it was not the right question." That is the end of the part that I am quoting. Were you not telling the readers that is the question you asked, but as maybe time went on, maybe that was not the right question to ask?

A Yes, but not that – I am not talking as literally perhaps as your question makes it seem. I think the sense of this is that there are many times when we talked about this I was trying to find out what had happened and I was – I never received a satisfactory answer.

• • •

MASSON Deposition at 326-15-335-5

• • •

MR. KENADY: Q. All right. You have retained or employed Mr. Brosnahan, who sued the Freud Archives; correct?

A. Correct.

Q. And I understand he's on your good list of lawyers like Mr. Morgan? He communicates with you?

MR. MORGAN: I don't know where there is a bad list. I don't know where you get the good list or a bad list.

MR. KENADY: Q. At any rate, he is on the approved list?

A. I was satisfied.

Q. You were satisfied. And he communicated with you, did he?

A. Yes, he did.

Q. Okay. Did he let you see the complaint that he filed on your behalf?

A. Yes.

Q. And did he let you see it before or after you filed and served it?

A. Before.

Q. Before?

A. Yes.

Q. Did he ask you to read it?

A. Yes.

Q. And did you?

A. Yes.

Q. And you understand what the complaint meant in terms of a necessity of truth and accuracy?

A. Yes. But –

Q. What did you understand?

MR. MORGAN: What do you mean, what did you understand? I don't –

MR. KENADY: Q. What did he understand that the complaint was supposed to represent in terms of truth and accuracy?

A. Well, that it should be true and accurate, of course, to the best of my recollection. We didn't entirely agree on every point in it and he asked me to defer to his greater legal knowledge in a number of issues, which I did.

Q. I see.

A. And if you want an instance –

MR. MORGAN: No, let him answer the question.

MR. KENADY: Q. Well, as a result of the disagreement, did anything get into the complaint that, in your mind, was not the truth?

A. Well, not the truth, but something that I did not feel as strongly about as he did about. It was true but it was –

MR. MORGAN: You've answered.

MR. KENADY: Q. What do you mean by you didn't feel as strongly as he did about something. What do you have in mind?

MR. MORGAN: Go ahead. Tell him.

THE WITNESS: Well, just that when he added libel – because Dr. Eissler had written and was quoted in the New York Times as saying, "Would you makd [sic] a man director of the Freud Archives who writes plain nonsense?" I did not like that, but I felt that was his opinion. He was not quoting me and he was entitled to his opinion.

And Jim said, "No, because doesn't it damage you?" And I said, "Well, it does, but" – and so, we argued a little bit about that, and he wanted to retain it and that's where he asked me to defer to his legal experience on the matter. But there was nothing untrue about it.

MR. KENADY: Q. Well, were your allegations of damage contained in the complaint, true and accurate with the possible possible exception of this libel complaint?

A. Yes. I mean, the amount is not something –

MR. MORGAN: Wait, wait. Ask the question.

MR. KENADY: Q. Do you recall how much you claimed in damages?

A. I don't actually know.

Q. Do you have a copy of your complaint available here?

MR. MORGAN: No, we didn't bring that.

MR. KENADY: Q. Well, I'll show you this document and represent to you that I'm told that it's a true

copy of the complaint that was filed on your behalf by Mr. Brosnahan.

Take your time and look it over and then I'll have a couple of questions to ask you.

A. Okay. Well, you can just ask me.

Q. All right. Sure.

Well, let's see. For the first cause of action, the wrongful discharge, you stated that you had suffered loss of wages and benefits and a sum in excess of two million dollars; correct?

A. Uh-huh.

Q. Looking at Paragraph 22?

A. Uh-huh.

Q. And that you had, likewise, suffered irreputable and permanent injury as a result of the wrongful discharge in being deprived of a unique position and Freud scholarship and have been denied access to the Freud collection?

A. Uh-huh.

Q. All right. Do those damages continue to this day?

A. Yes.

Q. And the next cause of action again is for breach of implied covenant requiring dismissal only upon good cause. In Paragraph 37, it's set forth that you suffered the loss of wages and benefits in the sum in excess of two million dollars?

A. That's correct.

Q. And then it goes on and in Lines 16 through 21 of Page 14 of your complaint and states that plaintiff has suffered and will continue to suffer the loss of academic research grants. Was that true?

A. Yes.

Q. As a result of the discharge?

A. Yes.

Q. And does that continue to this day?

A. Yes.

Q. All right.

The third cause of action, breach of implied covenant of good faith and fair dealing. That repeats the allegations about lifetime employment and mentions again the lifetime residence in the Freud house, and again mentions the damages in excess of two million dollars?

Is that true?

A. That's true.

Q. And is that continued to this day?

A. Yes.

Q. Fourth cause of action, breached duty of good faith and fair dealing.

It was stated that you were discharged without good cause and again suffered loss of wages and benefits, including the loss of residence, the loss of academic research grants in the amount of two million dollars. Was that true?

A. Yes.

Q. And then it says at Paragraph 47, Page 17, Line 10 through 12 that as a further result of the wrongful acts, plaintiff has been unable to find satisfactory employment of a similar kind by which to support himself and his family.

A. Correct.

Q. All right. Was that true?

A. Yes.

Q. And for how long has that continued?

A. Since.

Q. Since then?

A. Yes.

Q. All right. Now, you assert in Page 18 in Lines 12 through 16, that had plaintiff been aware of the falsity of defendant's representations, he would not have entered into an employment agreement with Defendant Freud Archives and he would not have resigned his tenured full Professorship at the University of Toronto. Now, is that true?

A. Yes.

Q. Is it true that Dr. Eissler urged you not to resign your tenured professorship?

A. That's correct.

Q. So, at least as far as he was concerned, he did not make a false representation which led you to resign your professorship?

A. Well, the reason he told me not to resign it was not because he thought I would ever be fired from the Archives, but he felt that an academic position was a prestigious and valuable thing to attain and there was no reason I couldn't do both.

Certainly it never occurred to me, or he never gave me any hint that this could only last for a year. He represented it to be a lifetime position.

Q. Sixth cause of action, commencing at the complaint page 19, Paragraph 55, you assert there that prior to your termination as projects director, you entered into agreements and had accepted invitations from Psycho Analytic Societies to make presentations. Would that yield money to you?

A. Yes.

Q. And then you list the organizations and then you charge that following your termination, each of those organizations had breached the agreement with you and had canceled your presentations?

A. That's correct.

Q. Is that true? All right. What amount of money was involved there?

A. Small amounts.

Q. I see. Nothing like two million dollars?

A. No.

Q. Then in the seventh cause of action, conspiracy to interfere with contractual relationship, Page 21, Line 24

through Line 6 on Page 22. Would you simply read that over to yourself and then tell me whether that was true?

A. That's true.

Q. And is it also true, as set forth in your complaint on Page 22, Line 12 as a proximate and direct result of the conspiracy that you've charged, plaintiff had become a pariah?

A. Yes, that's correct. I see where you're going.

Q. All right. In the psychoanalytic community?

A. That's correct.

Q. All right. And does that still continue?

A. Yes, it does.

Q. And plaintiff has suffered loss of employment opportunity?

A. That's correct.

Q. And then it continues on Page 22 at Line 24 through Line 26. Plaintiff has suffered a loss of professional reputation and prestige and has lost employment opportunities. Is that true?

A. That's correct.

Q. And does that continue to the present day?

A. Yes.

Q. And this was caused by the discharge from the Freud Archive and the conspiracy between Eissler and other unknown members?

A. That's correct.

MR. MORGAN: Well, are you asking him that that's the only cause of the problem today?

MR. KENADY: No, I don't think I said that's the only problem. I'm asking him whether the damages he's charging here still continue to this day and I did –

THE WITNESS: They do. They've been added to, but they continue.

MR. KENADY: Q. Then the eighth cause of action, Page 23, intentional infliction of emotional distress, and you state at Line 25, as a direct and proximate result of the aforementioned acts. We can understand in your discharge, you suffer humiliation, loss of professional standing and prestige, mental anguish and emotional and physical distress. Was that true?

A. That's correct.

Q. Did you seek any medical assistance?

A. No.

MR. MORGAN: The answer is no.

THE WITNESS: No.

MR. KENADY: Q. Did you take any medicines for the emotional distress?

A. No, I don't believe in that.

Q. Okay. I think you've told us that you haven't taken any medicines or sought any professional counseling for any emotional distress that's arisen from the publication in suit here?

A. That's correct.

Q. Now, the fifth cause of action for libel, you said you have some difference of opinion on?

A. That's correct.

Q. But your counsel said it should be in and you deferred to his professional judgment?

A. That's correct, exactly.

Q. In any event, it was known to all that you had sued Dr. Eissler for libel?

MR. MORGAN: I'm going to object. Well, if you know –

MR. KENADY: Q. Known to those who knew of the lawsuit.

A. I was not aware actually, because when Malcolm told me that I did, I denied it and it wasn't until she drew my attention to that that I realized I had. I did not know I had sued him for libel, no.

But I did, obviously.

* * *

Shawn Deposition at 19:5-19

* * *

Let's say it is an outside writer who writes a piece for us. I would be much more – and some outside writers do write pieces for us – I would be much more worried about all of these things that we are now discussing than I would be with somebody who has been here for twenty years, thirty years or ten years and who was taken onto

the staff in the first place because I had judged that person to be a person of character and a profoundly responsible person.

Therefore, I would not even question whether any of our writers had quoted somebody accurately or had in any way twisted something or distorted something, because I know them and I know they would not do it or they wouldn't be here.

* * *

Shawn Deposition at 24:8-25

* * *

I might say, I have been responsible for the journalistic writing in the magazine now for forty-seven years; thirteen years as managing editor in charge of the journalistic writing, thirty-four years as the editor-in-chief.

I cannot remember ever getting a complaint in forty-seven years – I cannot remember a single complaint that we have misquoted somebody unless it is Mr. Masson who now claims that we have misquoted him, but in – prior to that I don't know of a single complaint of misquotation which is astonishing.

I then asked – I asked the head of our Checking Department, the present head of our Checking Department whether he remembered such a complaint; no.

I asked a former head of the Checking Department whether she remembered any complaint on misquotation, and the answer was no.

* * *

Malcolm Deposition at 55:17-56:24

* * *

Q Since the early eighties, what was your function with *The New Yorker Magazine*?

A Writing long articles and a few book reviews. I can only now think of one book review now. Let's say long articles and a book review.

Q From 1980 up until 1983, who was your immediate superior at *The New Yorker*?

A Mr. Shawn.

Q What is his position?

A He is the editor.

Q Would you report directly to him?

A Well, "report" is kind of an odd word.

Q How would it be determined as to what articles you would write for *The New Yorker Magazine* in the eighties?

A I would speak to Mr. Shawn about them and he would either say, "Yes, that's fine, go ahead," or he would say he didn't think that was a good idea.

Q We were talking about during the 1980's. You would go to Mr. Shawn and you would suggest a particular article you wanted to write on; is that correct?

A Correct.

Q In the 1980's, how many staff writers were there for *The New Yorker Magazine*?

A I have no idea.

Q Are we talking about more than ten?

A Yes.

Q Did other staff writers operate in the same manner as you, in that they would go to the editor and say, "I would like to write on a particular article"?

A As far as I know, they did.

* * *

Malcolm Deposition at 64:19-65:8

* * *

Q As a staff writer for *The New Yorker Magazine*, are you required to write at least one article a year?

A No.

Q The determination is solely yours, whether you do or do not write?

A Correct.

Q Is there any distinction as far as *The New Yorker Magazine* is concerned between being a staff writer or a free-lance writer?

A No – I don't know what it is.

Q Are you required to spend any amount of time per year on working on articles for *The New Yorker Magazine* in order to be a staff writer?

A No.

* * *

Supreme Court, U.S.
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No. 89-1799

In The

Supreme Court of the United States

October Term, 1989

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

CHARLES O. MORGAN, JR.*
PAUL RICHARD KLEVEN
LAW OFFICES OF
CHARLES O. MORGAN, JR.
450 Sansome Street, Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, and to what extent, the First Amendment protects the publication of deliberately altered or manufactured quotations that are attributed to and defame a public figure.

2. Whether a Court may resolve factual disputes against a public figure in granting a motion for summary judgment made by defendants in a defamation action.

3. Whether there is an "incremental harm" doctrine that would render nonactionable a deliberately fabricated quotation attributed to a public figure which defamed him, because the public figure's actual remarks were provocative or bombastic.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated August 4, 1989, and amended February 15, 1990, is reported at 895 F.2d 1535, and appears in Appendix A to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of California, Eugene F. Lynch, District Judge, Presiding, dated August 17, 1987, is reported at 686 F.Supp. 1396, and appears in Appendix B to the Petition for Writ of Certiorari, an earlier opinion of Judge Lynch, dated August 19, 1986, appears in Appendix C to the Petition for Writ of Certiorari. The order of the Ninth Circuit denying a petition for rehearing, dated February 15, 1990, appears in Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Ninth Circuit Court of Appeals were entered and filed on August 4, 1989. On August 18, 1989, petitioner timely filed a Petition for Rehearing And Suggestion of Appropriateness of Rehearing En Banc, which was denied by order filed February 15, 1990. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. Introduction

After conducting extensive, tape-recorded interviews with petitioner Jeffrey M. Masson, respondent Janet Malcolm wrote an article for national publication containing quotations which she attributed to Masson. Alleging that many of the purported quotes were defamatory fabrications, Masson brought this suit for libel against Malcolm and her publishers, respondents The New Yorker Magazine, Inc. and Alfred A. Knopf, Inc. The Ninth Circuit has now affirmed a summary judgment against Masson, holding he could not prove that respondents published the article with knowing or reckless falsity even if they deliberately altered Masson's actual remarks.

2. Masson's Termination From The Archives

From 1975 to 1980, Masson was a full professor of Sanskrit & Indian Studies at the University of Toronto. He also underwent psychoanalytic training for eight years beginning in 1970, and he became a qualified psychoanalyst in 1978. Two years later, in 1980, he accepted a position as Projects Director of the Sigmund Freud Archives. (Joint Appendix 62-63).

While doing research in the Archives, Masson discovered material regarding Freud's "seduction theory," an early, controversial hypothesis that childhood sexual abuse caused certain emotional disorders. Freud had eventually abandoned the theory, contending that his patients merely imagined such abuse. The new material, long suppressed by Freud's daughter, Dr. Anna Freud, and other prominent psychoanalysts, led Masson to believe that Freud had discarded the theory for personal

rather than scientific reasons, despite his knowledge that children really were being molested. (J.A. 63).

Masson discussed this material with a reporter from the *New York Times*, which published two articles about Masson's discoveries. Dr. Anna Freud, Dr. K.R. Eissler, and other senior members of the Archives denounced Masson's findings and fired him in 1981. The *Times* also reported the firing. Respondent Malcolm, a staff writer on the *New Yorker* magazine, read about Masson in the newspaper and, in October, 1982, called Masson and asked to interview him about the controversy. (J.A. 47, 63).

3. Malcolm's Interviews With Masson

Masson gladly agreed to be interviewed, and in November, 1982 Malcolm went to meet him in Berkeley, California. At the first meeting she asked if she could tape-record the interviews, explaining that this would be to Masson's advantage because there would be no misquotations. Once again Masson agreed, and Malcolm ultimately compiled over 40 hours of tape-recorded interviews. On several occasions, Masson told her he was concerned that she quote him accurately; Malcolm assured him that she had it all on tape, and Masson should not worry because all quotes would be verbatim. She further promised that all facts would be checked by the famed fact-checking department of the *New Yorker*, though there would be no need to check quotes because there was a perfect record of them. (J.A. 63, 66). The taped interviews, which were the basis for most of the article that followed, have now been transcribed and are a part of the Clerk's Record; they covered a wide range of topics, including Masson's professional views and personal life. (C.R. 65).

4. Masson's May, 1983 Visit To New York

Six months after these interviews, Masson came to New York to work with the publisher of his forthcoming book, *The Assault On Truth: Freud's Suppression Of The Seduction Theory*. He accepted Malcolm's invitation to stay at her home during this trip. Although there had been interim, tape-recorded interviews on the telephone, by this time Malcolm had nearly finished writing her article about Masson; she told him she did not wish to talk about it and did not want Masson to see what she had written. Malcolm did organize, and tape-record, a party for Masson with other psychoanalysts. She also spoke with Masson about his edition (for Harvard University Press) of Freud's letters to the physician Wilhelm Fliess, and about Masson's reaction to a book written by the head of the Freud Archives, Eissler. The visit, however, was primarily social – Malcolm took no notes, and asked Masson no questions about the material for her article. (J.A. 64-66). She did not mention the visit in the article, and made no use of the tape recordings from the psychoanalysts' party. (J.A. 64).[1]

---

[1] Malcolm now contends that Masson made at least three of the disputed quotes during this visit, but that her tape recorder was broken, so she took handwritten notes which she later destroyed. She contends further, however, that four pages of typewritten material were taken from those notes. (J.A. 52-53, 112-118). Masson denies that he ever held such a conversation with Malcolm, or that Malcolm ever said anything about a tape recorder being broken. (J.A. 65-66). Significantly, in the article, the quotes allegedly made in New York are portrayed as part of conversations set in Berkeley, or as part of a November telephone conversation. (J.A. 68-69, 71, 79, 94, 126, 135).

5. Misquotations Discovered During Fact-Checking

Malcolm took Masson to meet other staff members at the *New Yorker*, including in particular the fact-checking department. She told him that he would be spending a lot of time with these people going over the article. But when fact-checker Nancy Franklin contacted Masson to verify information pertaining to the interviews, he became alarmed at the large number of errors. For example, Franklin asked whether Masson had been responsible for his ex-wife Terri's interest in analysis, and whether it was correct to call Terri "Polish." Masson had told Malcolm that Terri was in analysis when he met her and that she was not "Polish," but a Polish Jew who had been in the Warsaw ghetto, suffered from Polish anti-Semitism, and would object to being incorrectly called "Polish." Franklin asked if Masson's father came from Bessarabia; he said he had never heard of Bessarabia. Masson now told Franklin that he was concerned about the accuracy of the quotations being ascribed to him, and asked her to read back all of his purported quotations since there were so many errors in the few passages they had discussed. (J.A. 66-67).

Franklin refused, but told Masson not to worry because there were tape-recordings of all the conversations and the quotes would be verbatim. She then asked if it was true that Eissler returned Masson's letters unopened; Masson told her that was false and asked how all of these falsehoods could appear in Malcolm's writing if everything was on tape. Masson insisted that all quotations be verified with him because he was certain there were many inaccuracies, and asked Franklin to convey his concerns to Malcolm and then contact him again.

Franklin said she would do so, but Masson heard nothing more from respondents. (J.A. 67).

6. Misquotations In The Article

Franklin corrected these errors on the galleys but the article ultimately published by respondent *New Yorker* in December 1983 contained the original misquotations (J.A. 67-68, 226-28; C.R. 100, Ex. 2-5), along with many others, as Masson had feared. Although Malcolm reportedly told the respected editor-in-chief of the *New Yorker*, William Shawn, that "[e]verything that was quoted was on tape," (J.A. 223), the article actually attributed to Masson many fabricated quotations that do not appear anywhere on the tapes. The following quotes are the focus of this suit.

In the article, for example, Malcolm stated that during their first interview in a Berkeley restaurant, Masson compared his affair with an older graduate student to his relationship with the senior members of the Archives in the following words:

> She [the graduate student] said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room – you're just a social embarrassment anywhere else, though you do fine in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public."*
> (emphasis added)
> (J.A. 94).

The quote about the graduate student was accurate (J.A. 94-95), but Masson never called himself an "intellectual gigolo," and the emphasized portion of the above

quotation is an alteration of completely separate conversations. (J.A. 96, 104). The tapes do contain the following statement, which was not in the article:

> I couldn't get patients. . . . And I turned to these people who were supposed to be my friends and helpers and none of them offered anything. [Eissler and Anna Freud] felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.
> (J.A. 104).

Malcolm contends that Masson did call himself an "intellectual gigolo," though she claims it was during his May, 1983 visit to New York while her tape recorder was broken, and points to the typewritten document taken from her destroyed notes. (J.A. 115). Masson denies that he made the statement, and contends the document was fabricated. Alternatively, Malcolm relies on other taped statements made by Masson that she contends are similar, though none make any reference to "intellectual gigolo" or to any such concept. In these other statements, Masson discussed his belief that others within the psychoanalytic community ascribed his success to a "psychopathic quality," the charm of "the imposter," but said he disagreed with this "cheap," superficial analysis. (J.A. 97-98, 101). The tapes also contain a passage in which Masson paraphrased Malcolm's comment that younger analysts "go around worshipping the older analysts," using the phrase "suck stories" to characterize their attempts to ingratiate themselves. (J.A. 104-105). Malcolm denies that she told Masson that all quotes were taken from the tapes, and contradicts *New Yorker* editor-in-chief Shawn's testimony

that she made similar assurances to him. (J.A. 48-49, 83; *cf.* J.A. 223-24).

In the article, Malcolm also purported to quote Masson's discussions in Berkeley of his plans for Freud's house, Maresfield Gardens, which he was to occupy after the death of Anna Freud. On the tape, Masson had said:

> But it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and – Well, that's what it needs, but it is an incredible storehouse. I mean the library, . . . "
> (J.A. 127)

Malcolm's typed manuscript of the article reads:

> I would have renovated it, opened it up, brought it to life. Sun would have come pouring in, people would have come, there would have been parties and laughter and fun.
> (J.A. 133)

The last sentence was crossed out, and the following sentence, which appeared in the article, was handwritten above it:

> Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun.
> (J.A. 133-134).

This sentence is not on any of the tape recordings, and Masson never made the remark. (J.A. 79). The galley of this particular passage has a handwritten notation reading: "? on tape." (J.A. 134).

Malcolm contends that Masson made the statement during the May 1983 trip to New York while her tape recorder was broken, and points again to the typewritten document derived from her destroyed notes. (J.A. 115, 127). Masson denies making the statement or even discussing the issue during that trip. As an alternative, Malcolm again cites other tape-recorded statements by

Masson about his personal life. Masson had explained to Malcolm that he became interested in analysis because he considered his youthful promiscuity to be a symptom of a neurosis. He estimated he had slept with close to a thousand women, and saw this as an illness. (J.A. 129-132). Masson also said that he would have "great parties" in Maresfield Gardens and stated that he and another analyst would introduce women to each other. (J.A. 128-129).

The article contained another speech, never made by Masson and entirely absent from the tapes (J.A. 68-70), in which he allegedly boasted about the reaction to a book he was writing about his findings:

> "Wait till it reaches the best-seller list, and watch how the analysts will crawl," he crowed. "They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived."
> (J.A. 135).

Once again, Malcolm contends Masson made this statement during the 1983 visit to her home in New York, and it appears in the typewritten document she allegedly prepared from her notes. (J.A. 112-113, 135). On the tapes, Masson did talk about the importance of his discoveries, but stressed the psychoanalytic community's universal condemnation of the conclusions he drew from these discoveries:

> I assure you when [my] book comes out, which I honestly believe is an honest book, . . . the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it.
> (J.A. 136).
> Talk to Kernberg. Boy, he won't like my position one little bit, you can be sure. He hates it with a passion. . . . Talk to enough analysts and get

them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. It's me alone. . . . (J.A. 139) [discussing childhood rape].

Masson: Yeah but I've become, for better or worse; analysis stands or falls with me now.

Malcolm: Well that's a very grandiose thing to say.

Masson: Yeah, but it's got nothing to do with me. It's got to do with the things I discovered. (J.A. 137).

Uh, and when these, this book comes out, it's, uh, I mean I really feel it spells the beginning of the end of psychoanalysis, and he's definitely going to blame me, as will every other analyst in the world for having done psychoanalysis an irreparable damage. But what they'll say beyond that is still a puzzle to me, how they're going to reinterpret the documents I've found so that it, on the contrary, uh, enhances Freud's image is totally mysterious to me.
(J.A. 145).

Malcolm's article also related a statement by Masson about a generally respectful paper he had read to a professional society in New Haven which had concluded with a discussion of the sterility of psychoanalysis. For Masson, the consequences had been dire, for Eissler had given this paper as one reason for Masson's termination from the Archives. (J.A. 75). The scene was again set in Berkeley, this time in Malcolm's hotel room:

> When Masson hung up the telephone I . . . asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerant anti-Freudian he had become.
>
> Masson sidestepped my question. "You're right, there was nothing disrespectful of analysis in that paper," he said. "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in."
> (J.A. 175).

Masson did say that the last sentence of the paper was possibly a "gratuitously offensive way to end a paper to a group of analysts," (J.A. 176), but in response to her question, "What were the circumstances under which you put it [in]," (J.A. 176), he told Malcolm in detail why he felt compelled to put it in:

> Masson: That it was, was true. . . . As simple as that. I really believe it. I didn't believe anyone would agree with me. . . . But I felt I should say something because the paper's still well within the analytic tradition in a sense. . . . It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile and I believe that one, . . .
>
> I said, "[Freud] began a trend away from the real world that has come to a dead halt," and that's what I believe.
> (J.A. 176-177).

Masson's purported statement is not in the tapes, and Malcolm does not claim to have any documentation of it from the New York visit in 1983 or from any other conversations. (J.A. 179-180). Malcolm further admits Masson

never "sidestepped" her question because she never asked it:

> Let me put it this way. I never said, "Jeff, what has brought on your sudden virulent anti-Freudianism," as far as I can remember. Maybe you can find it in the testimony and I am mistaken. I am talking about my state of mind here and not Mr. Masson's.
> (J.A. 180-181).

In the article, Masson is quoted at the Berkeley restaurant describing his grandfather as:

> a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff – it sounded better.
> (J.A. 87).

This passage first appeared as a handwritten addition to the galleys (J.A. 90-91); it does not appear on the tapes, nor was it in Malcolm's notes of the tapes or in her manuscript. During a telephone conversation a month after the Berkeley interviews, Malcolm asked Masson for clarification of his name change, and he explained that the change was made as part of his analysis and a return to his family tradition:

> Masson: I changed my middle name, I didn't like it. [M]y dad's family name used to be Moussaieff, . . . [H]is father changed it. . . . Just to hide his Jewishness, I'm sure – . . . I first took it as my last name, and [my wife] objected that nobody could pronounce it and nobody knew how to speil it, and it wasn't the name that she knew me by, and so I said, "Okay."
>
> Malcolm: But you wanted to change it, to just remove Masson, didn't you?
>
> Masson: Yeah. I wanted to get back Moussaieff. . . .

> Malcolm: Um-hmm. Was that to épater the Toronto Institute or –?
>
> Masson: No, I just liked it. I just don't – . . . You know, it was sort of part of analysis, return to the roots, and your family tradition and so on.
> (J.A. 87-89).

Finally,[2] Masson in the article related to Malcolm a conversation in which Dr. Eissler pressured him to keep quiet about his discoveries so as not to "poison Anna Freud's last days."

> "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence."
>
> "Why should I do that?" [Eissler responded] "Because it is the honorable thing to do." Well, he had the wrong man.
> (J.A. 215).

These remarks do appear on the tapes and in Malcolm's handwritten notes taken from the tapes, but the actual remarks have been edited. Masson actually related the last portion of the exchange as follows (the deleted portions are emphasized):

> "You know, why should one do that?" "Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?"* Well, he had the wrong man.
> (J.A. 215).

---

[2] There are additional false quotations in the article, many of which are nondefamatory, such as the errors Masson discussed with the fact-checker, Franklin. Since the thrust of the defamation is apparent from quotations identified above, other allegedly defamatory quotes will not be discussed in detail here, though the Ninth Circuit did address them. (Pet. App. A at A-16-28).

7. Publication of Book; Reactions

Five months after respondent *New Yorker* published Malcolm's article in December 1983, respondent Knopf republished essentially the same material in book form as *In the Freud Archives* (all quotes in the Joint Appendix are from the book). By that time Robert Gottlieb, the president of Knopf, was aware that an attorney for Masson had contacted the *New Yorker* about the piece, and that a complaint had been lodged against Malcolm. (J.A. 224-226). Despite awareness of these complaints, Knopf published the piece without altering in any way the quotations that defamed Masson.

After publication of the book, Masson wrote a letter to the *New York Times* Book Review criticizing Malcolm's portrayal of him. In response, Malcolm composed a letter to the *Times* in which she asserted:

> I . . . allowed [Masson] to speak for himself, in direct quotation. . . . The portrait, in fact, is based on more than 40 hours of tape-recorded conversations with Mr. Masson, which began in Berkeley, . . . Many of things [sic] Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The "almost" refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversations with Mr. Masson to the editors of the Book Review whenever they have 40 or 50 short hours to spare.
> (J.A. 222-223).

Reviewers of the book and article believed Malcolm and condemned Masson. In the *Boston Globe*, psychiatrist and Harvard professor Robert Coles wrote:

> Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist – mean-spirited, self-serving, full of braggadocio,

> impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such; his own words reveal this psychological profile – a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.
> Coles, "Freudianism and Its Malcontents," *Boston Globe*, May 27, 1984 at 58, 60 (C.R. 69) (Pet. App. A at A-36) (Kozinski, J., dissenting).

Reviews of Masson's own book referred back to Malcolm's portrayal:

> . . . Malcolm's portrait of Masson is devastating: largely through his own words he emerges as a feverish jumble of vanity, self-destruction, childishness, and ruthlessness.
> Kirkus Reviews, April 1, 1984 at 395 (C.R. 69) (Pet. App. A at A-36-37) (Kozinski, J., dissenting).

Reviewers even chastised Masson for adopting his traditional family name as his middle name, stating that "the middle name is sort of a fake." *Huntsville Times*, January 7, 1984. (J.A. 93).

8. Proceedings In The District Court

Contending that the misquotations described above and many others of similar import were defamatory or placed him in a false light, Masson, a California resident, filed this diversity action pursuant to 28 U.S.C. §1332 against New York residents Malcolm, The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. On August 19, 1986, Judge Eugene F. Lynch of the United States District Court for the Northern District of California granted partial summary judgment for respondents on the grounds of substantial truth, and urged respondents to pursue other defenses by motion for summary judgment. (Pet. App. C at C-2 n.3 and C-15). On August 17, 1987, the

Court granted summary judgment in favor of all respondents, concluding that "[n]o clear and convincing evidence exists that would justify a finding that [respondents] entertained serious doubts about the truth of the disputed passages." (Pet. App. B at B-28).

9. Opinion Of The Ninth Circuit

The Ninth Circuit Court of Appeals affirmed the summary judgment against petitioner on August 4, 1989. Judge Arthur L. Alarcon wrote the majority opinion, in which he was joined by Judge Cynthia Holcomb Hall. Judge Alex Kozinski filed a lengthy dissenting opinion.

Although the Court, for purposes of reviewing the summary judgment, "assume[d] the quotations were deliberately altered," (Pet. App. A at A-5), it determined that Masson did not establish with convincing clarity that respondents, in fabricating the quotes, acted with knowing or reckless falsity. (Pet. App. A at A-30). The Court held that an author may "fictionalize quotations 'to some extent,' " determining that there could be no inference of actual malice:

> provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, . . . or do not "alter the substantive content" of unambiguous remarks actually made by the public figure, . . . (Pet. App. A at A-10-11).

The Court discussed each of the allegedly defamatory statements and held that Masson would not be able to prove clearly and convincingly that any were made with actual malice. For example, Masson's statement that Eissler "had the wrong man" was ambiguous, the Court found, in that it was unclear whether Masson was "the 'wrong man' to keep silent for selfish purposes or the 'wrong man' to do something honorable." Malcolm's

decision to edit the quote so that Masson clearly refused to act honorably was therefore a "rational interpretation" of Masson's ambiguous remarks. (Pet. App. A at A-29)

Regarding Masson's fabricated prediction that analysts would call him "the greatest analyst who ever lived," the Court found that it "reflects the substance of Masson's self-appraisal" in light of other "egotistical and boastful" statements that Masson actually made. A jury therefore could not conclude that Malcolm entertained serious doubts about the passage's accuracy. (Pet. App. A at A-18)

In discussing the statement about Mansfield Gardens, the Court did not explicitly apply either prong of its holding, but broadly found that "the 'sex, women, fun' quote is consistent with Masson's description of his life style and conception of 'fun.' " (Pet. App. at A-18).

The Court determined that the phrase "intellectual gigolo" was a rational interpretation of Masson's actual comments, and did not alter the substantive content of Masson's description of himself as a private asset but a public liability. (Pet. App. A at A-14). The Court noted that Masson's only proof that he did not make the statement was "his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the clear and convincing standard of proof." (Pet. App. A at A-14 n.4). The Court similarly dismissed Masson's claims of actual malice regarding the remaining altered quotations.

The Ninth Circuit therefore affirmed summary judgment for Malcolm and her publishers even though:

> It is uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson.
>
> (Pet. App. A at A-31)

The Court further determined that the phrase "intellectual gigolo" was not defamatory because, *inter alia*, the "incremental harm" to reputation caused by the phrase, beyond the harm caused by the nonactionable remarks in the article, was nominal or nonexistent. Given the "general tenor of the article and the many provocative, bombastic statements indisputably made by Masson . . . ," (Pet. App. A at A-16), the defamation claim was not actionable.

SUMMARY OF ARGUMENT

A. Deliberately altered and fabricated quotations do not represent the honest, inevitable, commonplace inaccuracies that this Court sought to protect in *New York Times Co. v. Sullivan*, 364 U.S. 254, 271, 278 (1984). Journalists almost universally condemn the practice, and by placing the statements between quotation marks, Malcolm knew she was falsely telling her readers that Masson had actually made the statements.

Masson is not asking this Court to impose liability for paraphrases, misperceptions, minor changes to correct for grammar or syntax, nondefamatory statements, or publications which alert readers that conversations have been fictionalized. Fabricated quotations that purport to be verbatim, however, deserve no more immunity than would any other calculated falsehoods, because they are at odds with the premises of democratic government that the First Amendment protects. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

This Court has recognized that even careless errors interfere with the quest for truth protected by the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Since respondents do not contend that the "right to doctor quotations is important to the operation of a free and robust press," (Pet. App. A at A-57 (Kozinski, J., dissenting), the Court has a duty to discourage the publication of false quotes. *Herbert v. Lando*, 441 U.S. 153, 172-73 (1979). Fabricated quotations damage the individual public figure's right to speak his or her own mind, and the Ninth Circuit's rule gives writers a privilege to invent any quotation that might arguably be consistent with the public figure's character.

The First Amendment protects communications, yet the Ninth Circuit's rule protects only a writer's privilege to distort while interfering with the speaker's right to expression and the audience's right to accurate information. To protect First Amendment values, the Court must reverse the decision of the Ninth Circuit.

B. Following the guidance provided by this Court for determining whether there was knowing or reckless falsity, the Ninth Circuit should have found that fabricated quotes could amount to deliberate falsification because they were fabricated and the product of Malcolm's imagination. *St. Amant v. Thompson*, 390 U.S. 727, 731-2 (1968). Instead, the Ninth Circuit protected writers whose fabricated quotes were found to be rational interpretations of ambiguous remarks. (Pet. App. A at A-10). In doing so, the Court misapplied cases in which this Court has protected writers for mistakes in choosing words to describe or paraphrase ambiguous documents or events. *Time, Inc. v. Pape*, 401 U.S. 279 (1971), *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Nothing in either case implies that writers who purport to give full, direct quotations of a speaker are free to invent new quotations, either to resolve any ambiguity the writer might perceive in the speaker's words or to

illustrate the writer's perception of the speaker's character.

The Ninth Circuit also protected fabricated quotes that it found did not alter the substantive content of actual unambiguous remarks. This standard was derived solely from *dicta* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom, Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977) which involved translation of a third party's words and the publisher's attempt to reduce the defamatory impact of those words. Neither *Hotchner* nor any other case has granted writers and publishers the dangerous privilege bestowed by the Ninth Circuit upon them.

In this case, each fabrication by Malcolm increased the defamatory impact and, in many instances, stated the opposite of what Malcolm knew Masson believed. The Court's sanctioning of a quote that "reflects the substance of Masson's self-appraisal." (Pet. App. A at A-18), would allow writers to invent almost any quote about public officials, political candidates, or other public figures.

C. Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the Ninth Circuit was required to resolve all credibility determinations and draw all justifiable inferences in favor of Masson in deciding whether to grant summary judgment. Instead, the Court found Masson's statement that he did not make one of the disputed statements to be insufficient, gave the benefit of every doubt to respondents, and ignored substantial evidence of knowing or reckless falsity. In contrast to the Ninth Circuit, other Circuit Courts have properly applied *Anderson* in reviewing evidence of actual malice.

In fabricating quotes a writer "necessarily entertained serious doubts as to the truth of the statements."

Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976). The record demonstrates Malcolm's knowing fabrication of the "sex, women, fun" passage as she progressively altered it to be defamatory. (J.A. 133-134). Malcolm told Masson, her editor-in-chief, and the readers of the *New York Times* that all quotes were on tape, yet now admits many were never taped. She claims three of the most damaging statements were made during an untaped conversation during a social visit months after the initial interviews and after most of the article had been written. She claims to have taken notes, which she destroyed, but relies on a typewritten document purportedly derived from the notes. On summary judgment the notes must be disregarded as evidence that Masson made the statements, and a jury could reasonably believe they were forgeries, calculated to conceal her knowledge that the quotes were false.

A jury could also determine that the publishers displayed reckless disregard for the truth by failing to take the time to review the tapes despite their awareness of many claimed errors in the article. *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2697-99 (1989) held that such "purposeful avoidance of the truth" would constitute actual malice.

D. The Ninth Circuit also erred in determining that the "intellectual gigolo" passage was not actionable under the so-called "incremental harm branch" of the "libel-proof doctrine." The District of Columbia Circuit in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986) emphatically rejected the theory as inconsistent with federal law, and it is also inconsistent with this Court's

recent acknowledgement that defamers may be more successful if part of their publications are true. *Connaughton*, 109 S.Ct. at 2698 n.37.

The Ninth Circuit's determination that Masson's "provocative, bombastic" statements precluded him from recovering for the "intellectual gigolo" passage is contrary to the First Amendment's goal to promote "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The quest for truth in this society demands that public figures make provocative, even bombastic statements, and to protect the First Amendment the Court must not protect fabricated quotations.

ARGUMENT

A. THE FIRST AMENDMENT REQUIRES THIS COURT TO DISCOURAGE, NOT PROMOTE, THE DELIBERATE ALTERATION AND FABRICATION OF QUOTATIONS

By extending constitutional protection to deliberately altered and manufactured quotations, the Ninth Circuit has encouraged the publication of these dangerous falsehoods even though they do not "represent[ ] the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984). The constitution requires a "defense for erroneous statements honestly made" because "erroneous statement is inevitable in free debate." *New York Times Co. v. Sullivan*, 364 U.S. 254, 271, 278 (1964). As Justice Powell explained:

> The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)

Fake quotes do not constitute either "speech that matters" or the type of honest, inevitable, commonplace falsehoods entitled to protection despite their lack of constitutional value. Unlike the stereo reviewer prone to malapropisms in *Bose Corp.*, Malcolm cannot contend that she "did not realize [her] folly at the time," *Bose Corp.*, 466 U.S. at 513, and deliberate alterations are not inevitable. Fabricated quotations, far from being commonplace, are anathema to responsible journalists, and the press has emphatically rejected the privilege handed to it by the Ninth Circuit.[3]

Under California defamation law, attributing false quotations to a person may constitute libel. *Selleck v. Globe International, Inc.*, 166 Cal.App.3d 1123, 1132, 212 Cal.Rptr. 838, 844 (1985); *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 72-73, 155 Cal.Rptr. 29, 35-36, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986). See also *When*

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[3] In his dissent below, Judge Kozinski set forth at some length the nearly unanimous condemnation of such practices by journalists. (Pet. App. at A-55-69 (Kozinski, J., dissenting)). Even if "concoct[ing] the perfect quote to make the point" is constitutionally protected, *Time* magazine calls the practice "morally indefensible," and quotes Bill Monroe, editor of the *Washington Journalism Review* as follows: " 'I don't know how any journalist can be happy with a judge condoning tampering with specific quotes.' " Henry, "The Right To Fake Quotes: A journalist's legal victory raises questions about ethics," Time, August 21, 1989, at 49. See also Warren, "To tell the honest truth, has the court given journalists a right to lie?" reprinted in Society of Professional Journalists, *Solutions Today For Ethics Problems Tomorrow: A Special Report by the Ethics Committee of the Society of Professional Journalists, 1989* (October 10, 1989).

Is A Quote Not A Quote? The Subjectivity of Truth In Masson v. New Yorker Magazine Inc., 64 ST. JOHN'S L.REV. 150, 162-64 (1989). Other states have also recognized that defamatory, false quotations are actionable; as the New York Court of Appeal reasoned in *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 255, 167 N.E. 432, 433-34 (1929):

> In order to constitute a libel, it is not necessary for the defendant . . . to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in her mouth or attaching to her pen words which make self-revelation of such a fact.

Although even extreme departures from journalistic standards do not, standing alone, deprive a journalist of First Amendment protection, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2685 (1989), such standards will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is "of a character" protected by the First Amendment. *Id.* at 2696, 2698-99.

Generally, for example, a journalist who finds a person's words to be unusable as a quote should resort to paraphrase, not invention, thereby informing the reader that the journalist to some extent has interpreted the person's actual words. (Pet. App. A at A-35-38 and A-68 (Kozinski, J., dissenting)); See also *Masson v. New Yorker Magazine, Inc.: But Don't Quote Me On That*, 21 PAC.L.J. 1107, 1132-1136 (1990)(discussing Ninth Circuit's blurring of distinction between quotes and non-quoted paraphrases). If Malcolm states, "Masson thinks he is the greatest analyst who ever lived," the reader recognizes this as Malcolm's possibly biased conclusion. The damage to Masson's reputation is reduced and, even if the statement is false, it might be difficult to prove Malcolm knew

it was false. There is no way to derive any information about Malcolm's bias from her false quotation of Masson "crowing" that analysts will say "he's the greatest analyst who ever lived." (J.A. 135).

There is no doubt Malcolm was aware that readers would erroneously believe Masson had made the quote.

> "[W]hen a newspaper puts quotation marks around a sentence, they warrant that is what the speaker literally spoke. If you make up quotes or alter them in any way you are misleading readers."
>
> "We think quotation marks are sacred. They represent our bond to the reader that the words inside the quotation marks were actually spoken in the way reported."
>
> Stein, "9th Circuit: It's OK to make up quotes," *Editor & Publisher*, August 12, 1989. (quoting James I. Houck, managing editor of *Baltimore Sun*, and Max Frankel, executive editor of *New York Times*).[4]

In her letter to the *New York Times*, Malcolm acknowledged the significance of quotation marks and stated, falsely, that she "allowed [Masson] to speak for himself, in direct quotation. . . . Everything I do quote Mr. Masson as saying was said by him, almost word for word." (J.A. 222).

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[4] See also Pet. App. A at A-32-37. (Kozinski, J., dissenting). Judge Kozinski noted that the *New Yorker* in particular has cultivated a reputation for accurate quotations and, in a non-litigation context, former editor-in-chief Shawn has stated, "We do not create conversations." (Pet. App. at A-66, A-86-87 (Kozinski, J., dissenting)). As former Secretary of State Henry Kissinger reportedly stated, in answering a question as to whether he had made a particular statement reported in the *New York Post*: " 'If it was quoted, I must have said it.' " Grutman, *Lawyers and Thieves* at 104 (1990).

At some point, a paraphrase would be actionable, but Masson here is not complaining of paraphrases, or of conversations included in docudramas, memoirs, reviews or other publications where the reader is told the quotes are not verbatim. (See Pet. App. A at A-70-73 (Kozinski, J., dissenting)).

Nor is he complaining of minor "changes made for the sake of correct syntax," which are commonplace and are the only alterations Malcolm admitted in her letter to the *Times*. (Pet. App. A at A-58-61, A-74-75 (Kozinski, J., dissenting); J.A. 222). This was also not a question of misperception or faulty notes. Since Malcolm attended the interviews and had possession of the tapes, she necessarily knew that the quotes she was attributing to Masson were false; i.e., she knew that Masson did not say, "I was like an intellectual gigolo." *Connaughton*, 109 S.Ct. at 2697-98.

Respondents also knew that many of the nondefamatory passages in the article were false, including the passages Masson discussed with the *New Yorker* fact-checker. (J.A. 66-68, 226-228). Masson obviously cannot object to these passages in this suit, except insofar as they place him in a false light or support the defamatory nature of the passages at issue. (Pet. App. A at A-75-79 (Kozinski, J., dissenting)).

Masson, therefore, does not seek to impose liability on any writer who departs from full, direct quotations, as respondents have argued. He complains of deliberately altered and manufactured quotations that defame him.

Malcolm presumably used false quotations to make her work more entertaining. (See Pet. App. A at A-37 n.2 (Kozinski, J., dissenting). The quotes conveyed no additional information, and by deliberately placing quotation

marks around words she knew Masson had not used, Malcolm was engaging in a calculated falsehood that threatens the constitutional interest in freedom of speech:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . , should enjoy a like immunity. . . .
>
> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.
>
> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)

As shown in *Garrison* and *New York Times*, 376 U.S. at 279 n.19, the Court initially perceived some merit in the innocent falsehoods protected by its new standard, but more recently it has determined that they have "no constitutional value." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues." *Id.*, (quoting *New York Times*, 376 U.S. at 270). In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court stated even more emphatically:

> False statements of fact are particularly valueless; they interfere with the truth – seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.
>
> *Hustler Magazine*, 485 U.S. at 52.

A Court should consider the benefits and the dangers presented by a particular type of falsehood at issue in

deciding whether to extend constitutional protection. The Ninth Circuit erred in affirming summary judgment against Masson without ever addressing the question posed by the dissent: "is the right to doctor quotations important to the operation of a free and robust press?" (Pet. App. A at A-57 (Kozinski, J., dissenting)). Malcolm and her publishers have never shown that right to be important. There was no justification, therefore, for the court's attempt to co-opt the "rational interpretation" doctrine for a totally unintended use.

The Court below also erred in not considering the potential dangers of its ruling. Courts have a duty to discourage the publication of calculated falsehoods such as deliberately fabricated quotes, and should impose liability on those who publish with the requisite culpability:

> not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. . . . [L]iability for damages which in turn discourages the publication of erroneous material known to be false or probably false . . . does not abridge either freedom of speech or of the press.
>
> *Herbert v. Lando*, 441 U.S. 153, 172 (1979)

False quotes interfere with the "freedom to speak one's mind [which] is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.*, 466 U.S. at 503-04. In attributing fabricated quotes to Masson, Malcolm and her publishers deny Masson the freedom to speak his mind both at the time of publication – by replacing his words with their own – and in the future, by making him an object of derision and ridicule. (J.A. 79-81). Defamation is a favorite tactic of those who seek to suppress the controversial opinions of others, and

the threat to First Amendment values is greater where the defamers purport, not to speak their *own* mind, but to speak the mind of the person defamed. Malcolm's fabricated quotes undermine "the power of [Masson's] thought to get itself accepted in the competition of the market. . . . " *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Perhaps the most dangerous aspect of the Ninth Circuit's rationale is its assumption that a Court may review the misquoted person's life history to determine whether, as in the case of the "sex, women, fun" passage, the "quote is consistent with [a public figure's] description of his life style and conception of 'fun.' " (Pet. App. A at A-18). In other words, if the writer and the Court believe Masson is the sort of person who would use the Freud house in that way, he cannot establish knowing or reckless falsity. By giving "authors . . . license to invent quotations on the basis of what they perceive to be a speaker's character," (Pet. App. at A-46 (Kozinski, J., dissenting)), the Ninth Circuit has handed them a right to fake quotes that is virtually without limit.

The Court below did state that actual malice could be inferred "when the language attributed to the plaintiff is wholly the product of the author's imagination," (Pet. App. A at A-10), but it disregarded even this limitation. The language attributed to Masson – "intellectual gigolo," "greatest analyst who ever lived," "sex, women, fun" – was, of course, wholly the product of Malcolm's imagination.

Respondents have burdened the Joint Appendix with voluminous excerpts from the tape-recorded interviews, often repeated, in an attempt to show that the defamatory statements were characteristic of Masson. But Malcolm's

ability as a skilled writer (Pet. App. A at A-49 n.10 (Kozinski, J., dissenting)) to invent quotes that sound like Masson is simply irrelevant in deciding whether, assuming as the Court must that Masson did not make the statements, Malcolm knew that he had not made them. The constitution does not protect writers "unscrupulous enough and skillful enough to use the deliberate or reckless falsehood" effectively. *Garrison*, 379 U.S. at 75.

The Court held that Malcolm could invent the quote, "after Freud, he's the greatest analyst who ever lived," because of the "egotistical and boastful statements" Masson made on the tapes (Pet. App. A at A-18). Writers, therefore, who can point to any statement by a public figure that may be interpreted as egotistical, boastful, cruel, stupid, evil, or bigoted, may now invent a quote exemplifying any of those qualities and attribute it to that public figure. (Pet. App. A at A-38-41 (Kozinski, J., dissenting)).

This type of character assassination seriously interferes with the "common quest for truth." No one reading a news article will know whether the public figures involved in the events of the day actually made the statements attributed to them, or whether the writer of the article invented the statements based on other things said or done by the public figures.[5]

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[5] Although it does not claim to rely on the Ninth Circuit's opinion, White and Sheridan, *In Defense of Poetic License*, LOS ANGELES LAWYER (April 1990) 28, provides a graphic example of this danger by arguing that the First Amendment would protect a journalist who attributed the following invented quote to Police Commissioner Sullivan, plaintiff in the *New York Times* case: "I want you to ring Alabama State College and keep out all of those nigger lovers who are protesting over our arrest of that troublemaker King." *Id.*

> [T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.
> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

Malcolm's "right to fake quotes" was preserved by sacrificing the protection that the First Amendment should afford to the communication, to its source, and to its recipients. This Court has never approved such a wholesale abuse of First Amendment interests.

Ironically, perhaps uniquely, this libel case demands that the Court side with the public figure and against the press in order to protect "[o]ur profound national commitment to the free exchange of ideas." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2695 (1989).

B. "RATIONAL INTERPRETATION" CASES HAVE NO RELEVANCE TO DELIBERATELY FALSIFIED QUOTATIONS, AND NINTH CIRCUIT'S "SUBSTANTIVE CONTENT" STANDARD HAS NO CONSTITUTIONAL SUPPORT

Although acknowledging that the meaning of "actual malice" or "reckless disregard" cannot be captured in "one infallible definition," this Court through its cases has "furnished meaningful guidance for . . . further definition," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), in order to "give content to these otherwise elusive constitutional standards." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2695 (1989).

In deciding to protect publishers of deliberately altered quotes, the Ninth Circuit largely ignored the guidance provided by this Court and instead patched together its own standard from pieces of decisions that do not

support its dangerous result. The Ninth Circuit refused to consider whether respondents' actions would constitute a "calculated falsehood" or "known lie" (*Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)); would reveal the quotes to be "deliberately falsified" (*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967)); would show the quotes were "fabricated" or "the product of . . . imagination" (*St. Amant*, 390 U.S. at 732); or would demonstrate a "purposeful avoidance of the truth." (*Connaughton*, 109 S.Ct. at 2698). As discussed at greater length in section C below, there would be sufficient evidence under these cases to support a jury finding of knowing or reckless falsity by clear and convincing evidence, and the grant of summary judgment was in error. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Ninth Circuit promulgated an "author's privilege to alter quotations" in two circumstances: where the fabricated quotations are " 'rational interpretations' of ambiguous remarks made by the public figure, . . . or do not 'alter the substantive content' of unambiguous remarks actually made by the public figure." (Pet. App. at A-10-11). The first half of the privilege is premised on a complete misreading of the rational interpretation doctrine, and the second on *dicta* from a Second Circuit decision.

The first of this Court's decisions involving "rational interpretations" was *Time, Inc. v. Pape*, 401 U.S. 279 (1971). *Time* magazine's summary of a lengthy report by the United States Commission on Civil Rights omitted the word "alleged" in detailing descriptions of police brutality alleged in a complaint filed against the plaintiff, Pape. *Time* quoted at length from the report's summary of the complaint. *Id.* at 482. The Court found the report to be

"extravagantly ambiguous" as to whether the Commission actually believed the incidents had occurred, and that *Time* had good reason to think the Commission had found the allegations truthful. *Id.* at 287-89.

The Court was concerned about the "set of choices" confronting a publisher who departs "from full direct quotation" of the words of a source regarding an underlying event, and found that an inference of actual malice from the deliberate omission of a word such as "alleged" would only be adequate "when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." *Id.* at 285. The Court added a "final cautionary note" limiting its holding to the specific facts of this case, and implying that even a similar omission of the term "alleged" in published reports of an unambiguous document might support a finding of knowing or reckless falsity. *Id.* at 292.

Pape protects writers forced to choose particular words when they depart from full direct quotation and paraphrase an ambiguous source. Malcolm was not purporting to paraphrase Masson. Since she had tape recordings there was no ambiguity as to the actual words Masson used, and she faced no choices in quoting Masson verbatim. There was also nothing ambiguous about Masson's statement, for example, that he was a "private asset but a public liability," particularly after he explained that while the older analysts liked to talk openly with him in private, "I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me." (J.A. 104). In the absence of ambiguity, *Pape* has no application.

Malcolm here was purportedly not departing from full direct quotation of Masson, who was not merely a

source of information about a separate event. Masson's words spoke for themselves – they were not just describing an underlying event, they were the event.

Finally, even if Masson's words were ambiguous, *Pape* did not imply that the document's ambiguity entitled *Time* to attribute a fabricated quotation to the Commission or to Pape, either to resolve any ambiguities, or to illustrate *Time*'s perception of their character. (Pet. App. A at A-18). *Pape* dealt with an omission which arguably caused damage, not by changing the nature of the allegation, but only by implying that an authoritative source believed the allegations. *Pape* 401 U.S. at 285. *Time* directly quoted some of the report in its article, but the Court nowhere implied that *Time* was free to alter those quotes or silently fabricate new ones.

The Ninth Circuit cited *Pape* not only for its privilege to alter quotes but also to justify respondents' editing of Masson's remarks, particularly the passage in which Masson said Eissler "had the wrong man." (J.A. 215). Once again, Malcolm was not paraphrasing Masson, and there were no ambiguities as to the words Masson actually used. Masson said:

> "[W]hy should one [keep silent]? "Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?"* Well, he had the wrong man.
> (J.A. 215).

By removing the emphasized passages, Malcolm effectively reversed Masson's remarks, so that instead of saying he was the wrong man to be bribed into silence, he stated he was the wrong man to do "the honorable thing." *Pape* allowed the omission of one word where the

document was "extravagently ambiguous" as to its meaning; it did not sanction a wholesale reworking of someone's actual remarks so as to state the opposite of what the person said.

The Court's more recent discussion of rational interpretation in *Bose Corp.*, 466 U.S. at 512-14, provides even less support for the type of deliberate alterations encouraged by the Ninth Circuit. The defendant in reviewing brands of loudspeaker systems said that plaintiff's system tended to wander "about the room" rather than "along the wall." This was clearly an event that "bristled with ambiguities and descriptive challenges for the writer," and the description, though erroneous, was "one of a number of possible rational interpretations." *Bose Corp.*, 466 U.S. at 512.

As mentioned above, *Bose Corp.* rejected the District Court's decision favoring the plaintiff because it would make an individual liable for using a malapropism, even though he did not "realize his folly at the time," and the statement was the "sort of inaccuracy that is commonplace" in free debate. *Bose Corp.*, 466 U.S. at 513.

Malcolm was not attempting to describe Masson's facial expressions or tone of voice. In purportedly quoting Masson verbatim, she was telling her readers that she was allowing "Masson to speak for himself in direct quotation," as she again asserted in her letter to the *New York Times*. (J.A. 222). In deliberately altering and manufacturing Masson's statements, she necessarily realized at the time that she was lying to her readers.

In *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987), involving translation of a statement in English into a Spanish headline, the Third Circuit properly applied *Bose Corp.* because it dealt with a translated

headline that purported to convey only the gist of a statement which had no direct translation. Mayor Dunn had complained in English about the city's litter problem, which he blamed in part on recent immigrants.

Defendants' Spanish-language newspaper carried a story on the Mayor's complaint with a headline stating that he had called Hispanics 'cerdos,' a Spanish term which can be translated as "pigs" or "slovenly" or "dirty people." *Dunn*, 833 F.2d at 451 n.2. The editors testified that there was no direct Spanish translation of the term "litterer," and that the use of single quotations marks in Spanish would not signify a literal, verbatim quotation, but only a use of the word in the figurative sense. *Id.* at 451.

The Court found 'cerdos' in its unaltered Spanish version to be a fair, if inadequate translation, less inflammatory than others rejected by defendants, and refused to find actual malice based "solely on the translation to English from Spanish of the language used by the defendant." *Id.* at 452. Since Dunn had presented no "countervailing factual evidence of actual malice," the Third Circuit properly protected the translated headline as a "a rational interpretation of remarks that bristled with ambiguities." *Id.*

Assuming that *Dunn* should apply, here there was substantial "countervailing factual evidence of actual malice," which will be discussed in detail in section C below. But *Dunn* should not apply – the publishers here were representing that Masson made the statements verbatim. They were not paraphrasing his remarks in a headline, and they were not faced with any translation

problems, because the interviews and the article were all in English.[6]

There is even less justification for the alteration of substantive content portion of the Ninth Circuit's privilege. The Court below derived this aspect of its privilege solely from *dicta* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977), which considered whether the publisher of a book about Ernest Hemingway acted with knowing or reckless falsity in publishing a bowdlerized translation of Hemingway's statement about the plaintiff. The Second Circuit held that publication of a literal translation of the actual quote attributed to Hemingway would have been protected because the quote was "incapable of independent verification, and . . . there are no convincing indicia of unreliability." *Hotchner*, 551 F.2d at 914. Changing Hemingway's statements from calling Hotchner " 'dirty and a terrible ass-licker' to the much milder 'I don't trust him,' " was not done with actual malice:

> "[T]he change did not increase the defamatory impact or alter the substantive content of Hemingway's statement. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner.
>
> *Hotchner*, 551 F.2d at 914.

Nothing in *Hotchner* suggests a writer can alter quotations in order to make them defamatory and then attribute them to a public figure. The case dealt with a dead third party, not with a live plaintiff whose tape-recorded

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[6] *See Ninth Circuit Reveals Shocking Truth! No Protection for Public Figures Against Deliberate Fabrications by Media!: A Comment on Masson v. The New Yorker Magazine, Inc.* 42 RUTGERS L.REV. 1133, 1159-60 (1990).

statements are subject to easy verification and who has notified the publishers of the text's unreliability. Malcolm and her publishers had reason to believe Masson had not made the statements. Far from making the passages less offensive, Malcolm on each occasion made her quotes more sensational and defamatory. "I was a private asset but a public liability" became "I was like an intellectual gigolo"; "the sun would come in and there would be people" became "Sun would have come pouring in, people would have come, there would have been parties and laughter and fun" and then became "a place of sex, women, fun"; "I really must say one thing that I really believe . . . and that was the last sentence" became "I don't know why I put it in."

Malcolm's changes did alter the substantive content of Masson's actual remarks. Malcolm knew Masson "liked" Moussaieff as his middle name because it represented a return to his roots and his family heritage, (J.A. 87-89, 91-92), yet she invented the vain explanation "it sounded better," to make it seem as if Masson made the change out of sheer vanity. An academic like Masson who claims to be an "intellectual gigolo" is admitting that he would prostitute himself intellectually. Masson never made such a statement, and his comment that he was a public liability in that he was "too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me," (J.A. 104) implies that he had not yet attained stature in the psychoanalytic community, not that his principles were for sale.[7]

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[7] Respondents' reference to other taped statements by Masson to show that he boasted of an ability to seduce the

(Continued on following page)

Malcolm actually knew from her conversations with Masson that he had repeatedly refused to compromise his principles in order to advance his career, and it is certainly no coincidence that Malcolm also altered those other statements or fabricated new ones. In the "he had the wrong man" passage, Malcolm deleted Masson's statement that he refused to keep quiet about his termination in the hope that the Archives would let him return, making it appear that he would simply refuse to do an "honorable thing." (J.A. 215).

Malcolm's article falsely states that Masson thoughtlessly "tacked on" his remarks about the sterility of psychoanalysis to his New Haven paper, and that "it was totally gratuitous. I don't know why I put it in." (J.A. 175). But Malcolm had asked Masson why he had concluded the paper in that fashion, and he had told her repeatedly that he said it because "it was, was true. . . . As simple as that. I really believe it. . . . And then I thought, I really must say one thing that I really believe, . . . And that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . . "

(Continued from previous page)

older analysts and visualized his relationship with them in sexual terms, accepted without question by the Ninth Circuit (Pet. App. A at A-13-14 n.4), is irrelevant and factually in error. Malcolm has Masson accuse himself of intellectual, not physical, prostitution. In the other statements, Masson did not boast of an ability to seduce people, but stated that other analysts enviously derided him as a confidence man, a bit of analysis that he rejected as "cheap." (J.A. 97-98). Even if the nature of the fabrication would make sex somehow relevant, Masson's discussion of "suck stories" was referring to the sycophantic behavior of junior analysts, not to any sexual relationship between him and the older analysts. (J.A. 104-105).

(J.A. 176). Malcolm therefore knew Masson had made the statement, which seriously damaged his career, out of strong conviction, yet quoted him saying the opposite.

Malcolm also had Masson say that analysts would say Masson was the "greatest analyst who ever lived," when she knew he had told her that "not an analyst in the country . . . will say a single word in favor of it." Malcolm admitted she knew Masson had made these statements. (J.A. 170, 172).

Masson's actual statements reflect his pride in what he discovered and his resulting isolated position in psychoanalysis, but do not betray a deranged personality crowing that he is the "greatest analyst who ever lived." Masson stated that on "*concrete issues . . . I hold a position* that no other analyst holds, including, alas, Freud . . . It's me alone." (J.A. 139) (emphasis added). When Malcolm questioned his statement that "analysis stands or falls with me now," Masson quickly explained: "it's got nothing to do with me. It's got to do with the things I discovered." (J.A. 137). Masson was definitely proud of his discoveries and their consequences for psychoanalysis, because:

> It's not going to go away, and the reason it's not is because these things are written by Freud, not be me. Freud wrote these letters, I didn't. I just found them and patients are going to say, "What the hell is going on here?"
> (J.A. 146).

Even if these other statements can be characterized as boastful, the Ninth Circuit's conclusion that Malcolm could invent the quote because it "actually reflects the substance of Masson's self-appraisal" (Pet. App. A at A-18), demonstrates that this standard has no coherent limits. Political candidates would be at the mercy of their

opponents and the press if there could be no liability for any manufactured quote that reflected the candidate's self-appraisal, character or actions. The First Amendment demands that this Court impose liability in order to discourage these dangerous, deliberate falsifications.

C. DISPUTED ISSUES OF MATERIAL FACT AND EVIDENCE OF KNOWING FALSITY PRECLUDED SUMMARY JUDGMENT

In reaching its conclusion that the evidence in the record could not " 'support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence . . . ,' " (Pet. App. A at A-4) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the Ninth Circuit purported to apply this Court's decision in *Anderson* to the facts before it. *Anderson*, however, held that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.
>
> *Anderson*, 477 U.S. at 255.

The Court properly disregarded Malcolm's disputed typewritten document and her claim that Masson actually made the statements, noting that for purposes of the appeal "we assume the quotations were deliberately altered." (Pet. App. A at A-5). But in deciding whether Masson actually called himself an "intellectual gigolo," the Court inexplicably resolved an evidentiary dispute against Masson:

> Masson indisputably made numerous statements which were the substantive equivalent of the "intellectual gigolo" quote Malcolm used; Masson's only proof that he never said such a thing is his simple, albeit vehement, denial. This showing is simply insufficient to pass muster under the applicable standard.
> (Pet. App. A at A-13-14 n.4).

This was clearly contrary to *Anderson* and, throughout its decision, the Court gave Malcolm and her publishers the "benefit of every doubt." (Pet. App. A at A-42) (Kozinski, J., dissenting). If the Court had viewed the evidence impartially and drawn all justifiable inferences in his favor, as required by *Anderson*, it would have had no choice but to send the case to the jury.

As discussed at some length above, the First Amendment has never protected calculated falsehoods. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2696 n.34 (1989) (citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), which first applied constitutional standards to public figures, Justice Harlan explained that *New York Times* allowed recovery where "the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Id.* at 153. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) cited *Butts'* discussion of "deliberate falsification," and determined that:

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.
> *St. Amant*, 390 U.S. at 732.

More recently, the Court in *Connaughton* held that a finding of actual malice could be based on the defendant's "purposeful avoidance of the truth." In that case, although tape recordings of an interview were available to defendants and a key witness was known to them, they neither listened to the tapes nor contacted the witness, making it:

> likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges.
> *Connaughton*, 109 S.Ct. at 2698.

1. Jury Could Infer Actual Malice From Evidence of Deliberate Alterations

Applying these guidelines to the facts of the instant case, a jury could infer knowing falsity solely from the objective evidence that Malcolm attributed words to Masson that he did not say. The article did not purport to convey Malcolm's impressions of Masson, and there is no contention that she misunderstood or misperceived what he said. Malcolm's articles attribute quotes to Masson: "I was like an intellectual gigolo," "Maresfield Gardens . . . would also have been a place of sex, women, fun," "they will say . . . he's the greatest analyst who ever lived," "I don't know why I put it in." She did not say, "Masson thinks he's the greatest analyst who ever lived." Those quotes do not appear on the tape-recordings of the Malcolm-Masson interviews, and Masson denies that he ever made the statements. The Court below accepted that premise in deciding the case.

By placing quotation marks around Masson's words, Malcolm was falsely stating to her readers that he had actually uttered those words, a falsehood she repeated in

her post-publication letter to the *New York Times*. (J.A. 222). Readers reasonably accepted Malcolm at her word. (J.A. 79-81). Since Malcolm conducted the interviews and had the tapes, she knew that Masson never made the statements she was attributing to him, and so published with knowing or reckless falsity.

This is precisely the holding of a California case involving false quotes. In *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds, McCoy v. Hearst Corp.*, 42 Cal.3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986), a novelist was found liable for attributing false quotes to an allegedly fictional psychiatrist who was identified at trial as plaintiff. The novel depicted a therapy session in which the character demanded profanely that a patient "drag" his wife to a "nude marathon." A tape recording of the actual therapy session proved that the plaintiff had actually only made a suggestion in a non-profane manner. The Court determined that the writer's:

> reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the litarary portrayals of that encounter [.] Since she attended sessions, there can be no suggestion that she did not knew the true facts. [Defendant] was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.
>
> *Bindrim*, 92 Cal.App.3d at 72-73; 155 Cal.Rptr. at 35-36.

The Seventh Circuit reached the same conclusion in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), in which the defendant writer stated that his fabricated quotations of Johnny Carson were "simply a logical

extension of what must have gone on from the facts that I read. . . . " *Carson*, 529 F.2d 212. Writing for a unanimous court, Judge Sprecher held:

> If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. . . .
>
> The defendants in fabricating and imagining "facts" necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness of their probable falsity. *Carson*, 529 F.2d at 213.

2. Overwhelming Countervailing Evidence Proves Publication With Knowing Or Reckless Falsity

Additional evidence regarding respondents' state of mind uniformly reinforces the inference drawn from the fact that Malcolm deliberately altered the quotes. Since Masson denies making the statements, Malcolm necessarily altered Masson's actual words or fabricated her own; the Ninth Circuit assumed "the quotations were deliberately altered," (Pet. App. A at A-5), and that "Malcolm fictionalized certain quotations and attributed them to Masson." (Pet. App. A at A-31).

The record contains direct evidence of Malcolm's deliberate fabrication of the "sex, women, fun" quote regarding the Freud home. The tapes show that Masson discussed his plans to "renovate it and open it up, and the sun would come in and there would be people. . . . " (J.A. 127). By the time Malcolm had typed her draft of the article, she had altered the quote to read, "Sun would come pouring in, people would have come, there would have been parties and laughter and fun." In handwriting, the quote is further altered to its final, published form:

"Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun." (J.A. 133-134).

Malcolm gradually distorted Masson's words, deliberately falsifying his statements to make them defamatory. Under *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968), a jury could well believe Malcolm acted with knowing or reckless falsity in fabricating these words out of her imagination.

As *Herbert v. Lando*, 441 U.S. 153, 160-165, 164 n.12, 165 n.15 (1979), makes clear, any competent evidence and all relevant circumstances may demonstrate actual malice. Malcolm's claim that Masson actually made some of these statements, buttressed by the typewritten document derived from her notes, would therefore be evidence of actual malice if disbelieved by the jury. On summary judgment, of course, the Court must assume that this claim is untrue and, at most, disregard the notes. But a jury could further believe that Malcolm deliberately destroyed her handwritten notes and forged her typewritten documentation. The jury might well be skeptical that the three most outrageous quotes were all made during one brief, informal, untaped conversation that occurred long after the 40-50 hours of taped interviews and after she had written much of the article. (J.A. 65).

This skepticism would be reinforced by her representation to her editor that "everything was on tape," and her post-publication letter to the *New York Times* which, giving Masson the benefit of the doubt, stated that everything was on tape. Malcolm also promised Masson that all quotes would be taken verbatim from the tapes. Malcolm now claims, of course, that many quotes were not

on tape, but if the jury believes Masson or Shawn it must conclude that Malcolm was lying on at least one occasion.

Both of Malcolm's publishers were guilty of "purposeful avoidance of the truth." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2698 (1989). Masson advised the *New Yorker* of numerous errors and the *New Yorker* falsely promised to contact him again about his concerns before publication. To the extent Malcolm can be considered an employee of the *New Yorker* as a staff writer, her knowledge is imputed to her publisher. Knopf had even greater awareness of disputes over accuracy. (J.A. 224-226). No one at either publisher "took the time" to listen to the tapes, *id.*, which was likely a deliberate decisions to avoid the facts. *Id.*[8]

Under the guidelines established by this Court and other Courts, a jury could well conclude that Masson had produced clear and convincing evidence of knowing or reckless falsity. *St. Amant*, 390 U.S. at 731-2; *Herbert*, 441 U.S. at 164 n.12; *Connaughton*, 109 S.Ct. at 2698-99. In *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988), the Third Circuit noted that since the jury could reasonably find either that *Time* did or did not act with knowing or reckless falsity depending on the witnesses it believed and the inferences it drew, there should be no summary judgment. The Court gave plaintiff the benefit of the doubt on all the evidence, including

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[8] Other evidence of actual include: Malcolm's admitted combination of different conversations, including changed locations; the *New Yorker*'s correction in the galleys of the errors Masson explained to Franklin and subsequent publication of the article with the original errors; and Franklin's promise that all quotes would come from the tapes and that she would contact Masson before publication.

Time's deliberate omission of exculpatory language in an F.B.I. memo, evidence from which the jury "could find that *Time*'s alteration implicitly recognized that the story would not 'intrigue' its readers without this significant falsification." *Schiavone*, 847 F.2d at 1092. The Fifth Circuit in *Zerangue v. TSP Newspapers, Inc.*, 819 F.2d 1066, 1071-72 (5th Cir. 1987), similarly conducted an appropriate evidentiary review.

The Court should clarify that this procedure must be followed before lower courts grant summary judgment against public figures, in order to discourage "more erratic and inconsistent" rulings on defamation summary judgment motions. *Anderson*, 477 U.S. at 272-73 (Rehnquist, J., dissenting).[9]

D. THIS COURT MUST REJECT AN "INCREMENTAL HARM DOCTRINE THAT WOULD PRECLUDE PUBLIC FIGURES WHO HAD MADE PROVOCATIVE REMARKS FROM ALL RECOVERY FOR LIBEL

In addition to determining that Malcolm did not fabricate the "intellectual gigolo" passage with knowing or reckless falsity, the Ninth Circuit found that in light of "the many provocative, bombastic statements indisputedly made by Masson and quoted by Malcolm," (Pet. App. A at A-16), the passage was not actionable under

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[9] To the extent the decision below turned on falsity rather than actual malice, the *Anderson* standards should not even have been imposed. See the careful analysis of this issue in *Masson v. New Yorker Magazine: Actual Malice and Direct Quotations – The Constitutional Right To Lie*, 65 NOTRE DAME L. REV. 564, 567-69, 574-80 (1990). The Court left this question open in *Connaughton*, 109 S.Ct. at 2682, noting a conflict among the circuits.

the " 'incremental harm branch' of the 'libel-proof' doctrine." (Pet. App. A at A-15). The Court cited in support only *Herbert v. Lando*, 781 F.2d 308, 310-11 (3d Cir.), *cert denied*, 476 U.S. 1182 (1986), though it acknowledged that "the *Herbert* court denied that it was applying the . . . 'incremental harm' doctrine." (Pet. App. A at A-16 n.5).

Any rule that punishes public figures for making provocative statements is contrary to the overriding First Amendment principle "that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . . " *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Ninth Circuit focused on quotes from the tapes and did not actually identify any bombastic statements from the published article, making it difficult to determine, as the doctrine would require, whether the incremental reputational harm caused by the defamatory quotes was non-actionable because it was "nominal or non-existent." (Pet. App. A at A-15) (quoting *Herbert*, 781 F.2d at 310-311). Apparently, any public figure who had made provocative, bombastic remarks could be labeled an "intellectual gigolo."

The "incremental harm" doctrine is simply an alternate formulation of the Ninth Circuit's main thesis that a writer may invent quotes to illustrate any character flaw he or she feels a public figure has previously demonstrated. For all the reasons discussed above, this Court must not allow such an interference with free speech. The Court recently acknowledged that the " 'defamer may be [all] the more successful when he baits the hook with truth.' " *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2670, 2698 n.37 (1989) (quoting *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (1966) (en banc)). Under California libel law, "a single

sentence may be the basis for an action in libel even though buried in a much larger text." *Washburn v. Wright*, 261 Cal.App.2d 789, 795, 68 Cal.Rptr. 224, 228 (1968). See also *Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 261, 721 P.2d 87, 91, 228 Cal.Rptr. 206, 209 (1986) *cert. denied*, 107 S.Ct. 880 (1987).

The Ninth Circuit's adoption of the incremental harm doctrine is not only contrary to *Connaughton* and California law, but also clearly conflicts with *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). As a matter of federal law, the Court rejected the theory:

> because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little good in all of us – or perhaps upon the pessimistic premise that no matter how bad someone is, he can always be worse.
> *Id.*

No matter what Masson actually said, "I was like an intellectual gigolo" caused specific damage to his reputation, damage that he could not have suffered until Malcolm fabricated the quote for publication by the *New Yorker* and Knopf. The Court must act to discourage such fabrications by imposing liability on those who use them to damage reputations and deceive the public.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,
CHARLES O. MORGAN, JR.
PAUL RICHARD KLEVEN
Counsel For Petitioner

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QUESTION PRESENTED

Whether a public figure in a libel case could establish actual malice merely by proving that he did not say particular words attributed to him, without showing any material change in meaning from words that he admittedly said.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1799

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

This case involves a claim by petitioner Jeffrey Masson that he was defamed by certain quotations attributed to him in an article written by respondent Janet Malcolm. The article was published in two parts by respondent The New Yorker Magazine, Inc., in 1983 ("Annals of Scholarship: Trouble in the Archives") and republished in book form by Alfred A. Knopf, Inc., in 1984 (*In the Freud Archives*). The district court granted summary judgment for respondents, concluding, *inter alia*, that petitioner, a public figure, had not presented clear and convincing evidence of actual malice. The court of appeals, with one judge dissenting, affirmed.

1. *The Work at Issue.* The issues in this case revolve around a small number of quotations from *In the Freud*

Archives.[1] The primary focus of the book is petitioner Jeffrey Masson, who, as a young Sanskrit scholar, chose to undergo training as a psychoanalyst throughout the 1970s. Late in that process, after Masson had begun contributing to psychoanalytic scholarship, he became acquainted with Kurt Eissler, a preeminent analyst and, at that time, the head of the Sigmund Freud Archives, a repository of materials of scholarly interest by and about Freud. By 1980, Masson had been hired by the Archives, as Projects Director, to undertake research concerning the life and work of Freud. In 1981, he was dismissed from that position. He went on to become a highly vocal and visible critic of psychoanalysis.

The book describes and analyzes Masson's rise and fall in the Archives. It sets forth how Masson came to challenge a crucial step in Freud's early thinking (his rejection of the "seduction theory"),[2] a step that opened the door both to the idea of childhood sexuality and to the method of analysis characteristic of the new discipline. Masson publicly talked about aspects of his challenge during his tenure as Projects Director of the Archives. Shortly after Masson delivered a paper at a psychoanalytic meeting in New Haven, his views were discussed at length in two articles published in *The New York Times*. Those articles, in turn, created a controversy among psychoanalysts, alienated Masson from Dr. Eissler and from Anna Freud (daughter of Sigmund and a prominent analyst in her own right), and ultimately led to his dismissal from the Archives. The dismissal, too, was reported in *The New York Times*.

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[1] Because the article and the book are essentially identical, we will refer to the work in its book form. We are lodging 20 copies of the book with the Clerk of the Court.

[2] In essence, Freud rejected the theory that childhood sexual abuse was the cause of all (as opposed to some) adult mental illness, concluding that emotion-laden adult "memories" of childhood must be examined with skepticism in order to separate what was real from what has been imagined. *See* P. Gay, *Freud: A Life for Our Time* 90-96 (1988).

In the Freud Archives is approximately 160 pages long. It includes literally dozens of pages of quotations from petitioner, including uninterrupted quotations of several pages at a time.

2. *The Preparation of the Work.* Janet Malcolm is a frequent contributor to *The New Yorker*. She had first written about psychoanalysis in a piece entitled "The Impossible Profession," which was published in the magazine and subsequently as a book by Knopf with the same title. Because of her interest in psychoanalysis, she had read about the Masson controversy and, a year later, decided to contact Masson about the possibility of a *New Yorker* piece on that subject. J.A. 47. Masson welcomed the idea. J.A. 47, 63.

Over a period of approximately seven months, Masson and Malcolm met a number of times in California and New York. They also spoke by telephone. Many of their conversations were recorded on tape. (The tape recordings run to more than 40 hours.) During the meetings, Masson invited discussion of all aspects of his life and work,[3] and disclosed many personal details.[4]

Some of the conversations were not recorded. For example, Malcolm did not tape her talks with Masson during his visit to New York in May 1983, when he was a guest at her home. Malcolm did make notes, however, of those and other conversations. J.A. 48, 52-53, 112-15, 239.[5]

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[3] *See* J.A. 229 ("One . . . doesn't want to avoid either the personal side about me and my whole life nor the side connected with my discoveries. . . . [T]here is no reason to stay away from anything, really.")

[4] *See* J.A. 128-32 (Masson describing on tape his sexual activities).

[5] As we discuss at pages 31-32, *infra*, petitioner has contested the authenticity of the notes of the conversations in New York.

Malcolm wrote the work in the spring and summer of 1983, using both the tapes and her notes.[6] The New Yorker published the articles in December of that year, and Knopf published the book in May 1984. The tapes and the notes provided the basis for the quotes attributed to petitioner in the work.

3. *The District Court Proceedings.* Masson brought suit against respondents in November 1984, claiming that certain quotations attributed to him in the book had defamed him and invaded his privacy. J.A. 254-67. Although the complaint made allegations about alteration of quotations, petitioner also asserted that one quotation had been misleadingly edited. J.A. 259-60. This initial complaint—the first of five filed by petitioner—made no mention of seven out of the 11 quotations ultimately contested by petitioner.

Petitioner did challenge, however, a number of quotations that have passed out of the case. For example, asserting that each seriously injured his reputation, Masson expressly denied having said that " 'analysis stands or falls with me now' " (J.A. 260); that analysts " 'sensed that I could single-handedly bring down the whole business and, let's face it, there's a lot of money in the business. And they were right to be frightened, because what I was discovering was dynamite' " (J.A. 260); and that there were " 'hundreds of articles on the positive effects of sexual seduction' " (J.A. 260). Masson's denials notwithstanding, each of those quotations appears on the tape recordings. *Compare* J.A. 259-60 (Complaint ¶¶ 15(b), (e), (i)) *with* J.A. 143, 137 *and* Clerk's Record 65, Exh., transcript of tape 6, at 31. Masson eventually withdrew this complaint.

[6] Malcolm also used notes and tapes of interviews with more than a dozen people who had known petitioner personally and professionally. J.A. 48.

In his Second Amended Complaint,[7] petitioner dropped his challenge to a number of quotations, including the ones discussed above, but elected to object to two more. Again asserting injury to his reputation, he denied saying that he would postpone his resignation from the International Psychoanalytic Association " 'until I can get the most effect out of it' "; he further denied saying that he had told Dr. Eissler, in response to a request, that he was " 'not going to give . . . back' " some original letters of Sigmund Freud. Those quotations, too, appear on the tape recordings. The district court dismissed these claims on the ground that petitioner had shown no falsity. *See* Pet. App. C9.[8]

After obtaining the recordings of his conversations with Malcolm, Masson filed a Fourth Amended Complaint, adding allegations about five previously unmentioned misquotations. Respondents then sought summary judgment with regard to all of the claimed misquotations in this complaint, both old and new. As to all of the alleged misquotations, respondents argued, *inter alia*, that the evidence was insufficient to allow a reasonable jury to find, by clear and convincing evidence, that any defamatory falsehoods were published with actual malice.

The district court granted the motion. Noting the absence of any direct evidence of actual malice, the court rejected the argument that "the requisite malice can be inferred simply based upon the alleged literal inaccuracy of the [illegible] or the fact that Masson did not actually

[7] A First Amended Complaint alleged no particular misquotations. The district court dismissed it for lack of specificity.

The allegations of the Second Amended Complaint were carried forward in a Third Amended Complaint, which did not add or withdraw any allegations about specific quotations. It differed from the Second Amended Complaint only by the addition of allegations regarding special damages, as required by the district court.

[8] The district court dismissed several other claims on the same basis. Pet. App. C7-C14.

use the precise words that Malcolm attributed to him." Pet. App. B6. It held, instead, that petitioner could establish actual malice only if the *meaning* of the passages so differed from the meaning of his own words that the quotes would not constitute "rational interpretations" of the undisputed remarks.[9] (In making this comparison, the court looked only at statements by Masson on tape, without relying on the challenged notes of untaped conversations. Pet. App. B6 n.4.) Then, examining each of the relevant passages in turn, the court found no evidence sufficient to create an issue of actual malice for a jury.

The district court further held that The New Yorker and Knopf were entitled to summary judgment on the issue of actual malice. Saying that petitioner had based his claim against the magazine on a theory of vicarious liability, the court held that the claim failed because Malcolm was not liable. Pet. App. B27.[10] Furthermore, the court held that both The New Yorker and Knopf could reasonably rely on the work of a known and respected author. Pet. App. B27. Although Masson had made general objections to the accuracy of the work, the court concluded that this complaint was not enough on its own to establish actual knowledge of falsity or reckless disregard of the truth. Pet. App. B28.

4. *The Court of Appeals Ruling.* The court of appeals affirmed. Like the district court, the court of appeals rejected the proposition, urged by petitioner, that "a jury could find actual malice by clear and convincing evidence based solely on the evidence he presented showing that Malcolm had deliberately 'fabricat[ed] quota-

[9] Pet. App. B6-B7 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512-13 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279, 285-86, 290 (1971)).

[10] The court therefore did not reach the issue whether Malcolm was an employee of the magazine, a necessary predicate for any vicarious liability. Petitioner did not seek to impose vicarious liability on Knopf.

tions ascribed to him.'" Pet. App. A5. The court concluded that knowledge of a difference in words—even assuming such knowledge existed—would not be enough. Rather, the court held that actual malice could not be inferred if the changes in words did not "'alter the substantive content'" of the original words or were "'"rational interpretations"'" of those words. *See* Pet. App. A11 (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)).

The court then applied this standard to each of the alleged misquotations. Beginning with the nine quotations alleged by petitioner to have been "altered" or "fabricated," the court of appeals found no change in substantive content (from what Masson admits to saying) with respect to eight of the nine.[11] Those eight include all five of the allegedly altered quotes still being challenged by petitioner in this Court.[12] Then, turning to the two quotations said to have been misleadingly edited, the court held that the editorial decisions made by Malcolm reflected rational interpretations of Masson's statements and thus did not demonstrate actual malice on her part.[13]

[11] Like the district court, the court of appeals did not rely on the notes from which some of the contested quotes were actually drawn. It made comparisons only with undisputed statements by Masson on the tapes.

[12] Pet. App. A11-A24. In some cases, the court simultaneously endorsed the district court's conclusion that the passages constituted "rational interpretations" of ambiguous remarks. The only passage analyzed solely under the "rational interpretation" standard was the one in which Masson asserts that "'Eissler would have admitted . . . [I] was right'" about the significance of a particular discovery Masson made. *See* Pet. App. A22-A23. That quote is not at issue in this Court.

[13] Pet. App. A26-A29. Only one of the two passages is included in petitioner's arguments in this Court.

The court noted alternative grounds for its rulings on two of the disputed quotations. Having found no actual malice regarding the "intellectual gigolo" quotation, the court went on to state, first, that "the 'intellectual gigolo' quotation is not defamatory" and, second, that it "is non-defamatory under the 'incremental harm branch' of the 'libel proof' doctrine." Pet. App. A15. Moreover, in reviewing the quotation about "sex, women, fun," the court took note that the district court had found the passage to be " 'substantially true because the sting of the passage is the same as that of undisputed tape-recorded passages.' " Pet. App. A17 (quoting Pet. App. B22). *See also* Pet. App. C7-C8. In concluding that the quotation is "consistent with" other statements made by petitioner, the court of appeals appears to have approved the holding of the district court with respect to substantial truth, while also relying on it as a basis for finding a lack of evidence of actual malice.[14]

Judge Kozinski dissented. His disagreement with the majority rested on two principal grounds. To begin with, he argued that many of the challenged quotations were significantly different in content and/or tone from unchallenged statements of Masson on the tapes. He regarded those differences as sufficient to allow the inference that Malcolm used fictionalized quotations "to paint an image materially different from what Masson's own words would have conveyed." Pet. App. A49.

Judge Kozinski also proposed a different legal standard. Under his analysis, a statement in quotation marks would be subject to a five-part inquiry. Pet. App. A69. He argued that a statement should be actionable if it purports to represent the speaker's actual words; the statement is inaccurate; the inaccuracy goes beyond an "immaterial" or "cosmetic" change; the inaccuracy conveys a defamatory impression of the speaker; and the defendant was aware of the inaccuracy or acted with "reckless disregard" of a possible inaccuracy. Pet. App. A69-A82. Applying that test, Judge Kozinski found sufficient evidence with regard to each of the respondents to justify submitting the issue of actual malice to a jury. Pet. App. A80-A88.

[14] The court also found no liability on the part of The New Yorker and Knopf, stating: "Because we have concluded that Masson failed to present evidence sufficient to support a reasonable jury finding that Malcolm acted maliciously, the district court did not err in holding that The New Yorker and Knopf cannot be held liable for publishing the article and book." Pet. App. A30.

Masson filed a petition for rehearing with a suggestion of rehearing *en banc*. The petition was denied on February 15, 1990. This Court granted certiorari on October 1, 1990.

SUMMARY OF ARGUMENT

A public figure, like petitioner, "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). In this case, petitioner—who claims that he was misquoted—argues that he can prove "knowledge of falsity" (*i.e.*, actual malice) merely by presenting "objective evidence that [the author] attributed words to [him] that he did not say." Pet. Br. 43. But petitioner has misunderstood the concept of falsity as it relates to libel law in general and to actual malice in particular: what he must prove is not just knowledge of some change of *words*, but knowledge of a material change of *meaning*. Petitioner cannot meet that burden.

I.

The idea that falsity (and, in turn, knowledge of falsity) can rest upon a difference in words alone is foreign to the principles of libel law. A plaintiff in a libel case must show, not just falsity in an abstract or technical sense, but falsity that affects the understanding of those reading the publication. The essential inquiry is "whether the [alleged] libel as published would have a

different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander, and Related Problems* 138 (1980) (internal quotations omitted).

This requirement follows naturally from the fact that, in libel law, "the interest protected is that of reputation." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* 797 (5th ed. 1984). Indeed, this Court has recognized that it is the interest in protecting reputation that allows states, notwithstanding the First Amendment, to impose liability for knowing falsity. *Gertz v. Robert Welch*, 418 U.S. at 341. A misquotation without a genuine change in meaning, however, does not infringe any legitimate interest in protecting reputation; at most, it presents a concern about journalistic practices. A state, even if it wished to do so, could not regulate those practices for their own sake. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 (1989).

The position advanced by petitioner would also create an unsound distinction between the law applied to quotations and the law applied to other ways of presenting what people have said. This case narrowly concerns quotations that in most instances reflect only minor word changes from, and in all instances convey the same meaning as, what petitioner admits to saying in the interviews with respondent Malcolm. If the words to which petitioner objects had been contained in a paraphrase of his statements, petitioner could not demonstrate actual malice without showing that the author knew of (or recklessly disregarded) a difference in meaning. Yet no greater injury to reputation is caused by a quotation than by a paraphrase, as long as any departure from exact reproduction of the spoken words does not materially change the meaning.

The breathing space provided by the First Amendment is needed for quotations, just as for other means of presenting speech. As this Court has observed, "[a]ny

departure from full direct quotation of the words of [a person interviewed], with all its qualifying language, inevitably confronts the publisher with a set of choices." *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1971). Were this Court to allow liability for deviations from verbatim quotation, regardless of whether the author knew of any change in substance, it would seriously affect the ability of writers to write, and readers to read, a clear text. There is no reason to impose those restrictions on the press in the absence of any damage to reputation.

II.

Petitioner not only must prove actual malice, properly defined, but he must do so with "convincing clarity." *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 & n.30 (1984). To withstand a motion for summary judgment, he must present "affirmative" and "concrete" evidence sufficient to meet that heightened standard of proof. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986).

Petitioner has no such evidence. To begin with, he has produced no evidence directly showing that respondents knew or were made aware of any distortion of the meaning of what he said. He thus is forced to rely on differences in the words themselves to establish that respondents must have had such knowledge. But, as both courts below correctly recognized, the asserted differences fall far short of demonstrating that respondents knew of, or recklessly disregarded, any different meanings at the time of publication.

ARGUMENT

The basic principles applicable to libel cases are by now familiar. Although the First Amendment broadly protects speech concerning public figures, this Court has recognized that the states may impose liability for a limited class of defamatory falsehoods causing injury to reputation. For a public figure like petitioner to bring his case within that category, he must show not only that the statements were false and defamatory but also that they were published with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The second element—that of subjective state-of-mind—requires that the plaintiff establish knowledge of falsity on the part of the author (and publisher) or at least a "high degree of awareness of [the statements'] probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). More pointedly, the plaintiff must demonstrate that the author (and publisher) "in fact entertained serious doubts as to the truth of [their] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2696 (1989). That showing, moreover, must be made by clear and convincing evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984). This Court has aptly described the burden imposed on a public figure as "substantial indeed." *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

The court of appeals, in applying the actual malice standard to the alleged misquotations, required petitioner to show that respondents knew (or strongly suspected) that any departures from verbatim transcription changed the substantive content of the quoted statements. Petitioner attacks that focus on substance, urging this Court to hold that, in a case involving quotation of a public figure, "a jury could infer knowing falsity *solely* from the objective evidence that [the writer] attributed words to [the public figure] that he did not say." Pet. Br. 43 (emphasis added). We think that idea is simply incorrect:

as we discuss below, to establish actual malice, a public figure must show, not merely knowledge of a difference in words, but knowledge of a difference in meaning that creates a false and defamatory impression. Petitioner cannot do so. Indeed, his remaining complaints about six particular quotations involve alleged word changes that are utterly insignificant under a standard properly concerned with knowing changes of meaning.

I. TO RECOVER IN LIBEL FOR ALLEGED MISQUOTATION OF HIS SPOKEN WORDS, A PUBLIC FIGURE MUST PROVE THAT THE CHALLENGED QUOTES WERE PUBLISHED WITH KNOWLEDGE OR STRONG SUSPICION THAT THEY DIFFERED IN DEFAMATORY MEANING FROM THE SPOKEN WORDS.

To understand what is required to prove "knowledge of falsity," it is necessary to consider just what "falsity" means in the law of defamation. Petitioner seeks to argue that knowledge of falsity—and, hence, actual malice itself—can be proved by showing simply that the author (or publisher) knew (or strongly suspected) that the published quotes were not verbatim. *E.g.*, Pet. Br. 26, 35, 43-44.[15] That view is insupportable for at least two related reasons. First, it disregards the fact that the falsity necessary to sustain a libel case—and thus, logically, the falsity of which there must be knowledge—involves a distortion of meaning, not just a variation in words. Only a

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[15] Petitioner states: "By placing quotation marks around Masson's words, Malcolm was falsely stating to her readers that he had actually uttered those words . . . . Since Malcolm conducted the interviews and had the tapes, she knew that Masson never made the statements she was attributing to him, and so published with knowing or reckless falsity." Pet. Br. 43-44. *See also* Pet. Br. 26 ("Since Malcolm attended the interviews and had possession of the tapes, she necessarily knew that the quotes she was attributing to Masson were false; i.e., she knew that Masson did not say, 'I was like an intellectual gigolo.'"); *id.* at 33 (Malcolm "faced no choices in quoting Masson verbatim" because she had tape recordings).

difference in meaning, not a difference in words alone, can result in an injury to reputation, the interest that justifies allowing damages against the press in libel actions. Second, it leads to irrational distinctions in the law of malice applicable to different forms of presenting information—distinguishing, for example, between quotations (in which knowing differences in words would be en[illegible]) and paraphrases (in which knowing differences i[illegible]aning would be required). Because the potential ef[illegible] on reputation is essentially the same in both cases, and because the underlying First Amendment interests are the same as well, the Court should give the same protection, no more and no less, to both types of speech.

A. The Concept of Falsity in Libel Law Depends Upon a Difference in Meaning as Understood by the Reader and the Resulting Effect on Reputation.

1. *The Understanding of Meaning.* The first problem with petitioner's construction of "falsity" as concerned with differences in language, rather than with differences in meaning, is that it detaches the concept of falsity from the very essence of his libel action. A plaintiff in a libel action—whether claiming misquotations or not—must show that the alleged false statements injure him in the eyes of those who read or learn the contents of the publication.[16] This concern about the effect on others is the reason for the requirement that the alleged libel have been published to at least one third party. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* 773-74 (5th ed. 1984) ("*Prosser & Keeton*"); Cal. Civ. Code § 45 (Deering Supp. 1990) (requiring "publication"); Restatement (Second) of Torts §§ 558, 577. What is crucial, therefore, is "whether the [alleged] libel as published would have a different effect on the mind of the

[16] *See* Cal. Civ. Code § 45 (Deering Supp. 1990) (libel must expose plaintiff "to hatred, contempt, ridicule, or obloquy" or "cause[] him to be shunned or avoided" or have "a tendency to injure him in his occupation"); Restatement (Second) of Torts § 559.

reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander, and Related Problems* 138 (1980); *Hayward v. Watsonville Register-Pajaronian & Sun*, 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295, 300 (1st Dist. 1968); *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337, 339 (1972).

Libel law, in California and elsewhere, accordingly focuses on the substance of the understanding conveyed to a reader rather than on particular words: "The form of the statement is not important, so long as the defamatory meaning is conveyed . . . ." *Prosser & Keeton* at 776. That is why defamatory implications may be actionable. *See id.* at 780 ("The form of the language used is not controlling, and there may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony.") (footnotes omitted); Restatement (Second) of Torts § 563 Comment c; *cf. Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990). The same focus is also reflected in the principles that "[p]articular words must be read in the context of the entire communication" (R. Sack, *supra*, at 52);[17] that "[t]he literal 'truth' of a publication need not be established, only that the statement is 'substantially true'" (*id.* at 137); and that "[t]he proof of 'truth' must go to the 'gist' or 'sting' of the defamation" (*ibid.*, citing *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977)). *See Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980) (under California law, there is no liability if the challenged statement, "although not literally true in every detail, is substantially true in its implica-

[17] *See Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 261, 721 P.2d 87, 91, 228 Cal. Rptr. 206, 209-10 (1986), *cert. denied*, 479 U.S. 1032 (1987) (publication must be "read as a whole"); *Prosser & Keeton* at 782 ("[A]n entire writing . . . must be construed as a whole. The plaintiff may not lift words out of their context, and the defamation contained in one line may be negatived or explained away by what appears elsewhere.") (footnotes omitted).

tion, that is, that the 'gist' or 'sting' of the article, read as a whole, is true"), *cert. denied*, 449 U.S. 1102 (1981).[18]

It is thus a falsity of substance, not a falsity of words used to convey that substance, that matters in libel law, and there is every reason to maintain that focus when the issue is knowledge of falsity in a quotation case. For example, in *Hotchner v. Castillo-Puche*, 551 F.2d at 914, the Second Circuit found a lack of actual malice—despite the fact that the publisher had deliberately altered a quotation by Ernest Hemingway about the plaintiff—on the ground that "the change did not increase the defamatory impact or alter the substantive content of [the quotation]." The court reasoned that if the publisher "could not have been liable for publishing the uncut [*i.e.*, original] version, it cannot be liable for deciding to make the passage less offensive to [the plaintiff]." *Ibid.* Put another way, the Second Circuit correctly recognized that even knowing changes in language should not result in a loss of First Amendment protection as long as the publisher had no reason to know that the meaning conveyed as a result of the change was any different.[19]

Although *Hotchner* involved a quotation by a third party about the plaintiff, its general reasoning applies as well to the present case, involving statements of the plaintiff himself. In this situation, either or both of two injuriously false meanings may be conveyed to readers. One is the substance of what the plaintiff said about himself—for example, that he committed a particular bad act.[20] The second is the impression to be drawn sim-

[18] *See Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 126, 210 Cal. Rptr. 485, 488 (4th Dist. 1985) ("It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified.") (internal quotation omitted), *language quoted with approval* in *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d 244, 262 n.13, 690 P.2d 610, 621 n.13, 208 Cal. Rptr. 137, 148 n.13 (1984), *cert. denied*, 478 U.S. 1009 (1986); *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 160, 143 P.2d 20, 28 (1943); *Kurata v. Los Angeles News Publishing Co.*, 4 Cal. App. 2d 224, 227-28, 40 P.2d 520, 522 (2d Dist. 1935).

Liability cannot be imposed based simply on the use of colorful language. Thus, in *Jennings*, the court held that a newspaper could not be held liable for using the terms "tax fraud" and "tax evasion" to describe a no-contest plea to the federal misdemeanor of failing to file tax returns. Examining the "gist" or "sting" of the articles as the "'average reader of [the newspaper] would reasonably interpret the articles'" (164 Cal. App. 3d at 127, 210 Cal. Rptr. at 489, quoting *Kilgore v. Younger*, 30 Cal. 3d 770, 777, 640 P.2d 793, 797, 180 Cal. Rptr. 657, 661 (1982)), the court concluded: "'Tax fraud' and 'tax evasion' are harsh terms; but we cannot say the average reader would have viewed the offenses differently . . . had less colorful descriptions been chosen." *Ibid.* *See also Greenbelt Coop. Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6 (1970) (charge of "blackmail" not actionable where reasonable reader would not have understood it to charge criminal offense).

[19] By contrast, the quotations at issue in *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist.), *cert. denied*, 444 U.S. 984 (1979)—a case heavily relied on by petitioner (Pet. Br. 23, 44)— were completely different in both substance and tone from, and considerably more defamatory than, the words actually spoken by the plaintiff. We also note that this case—with a background of more than 40 hours of conversations between Masson and Malcolm—does not involve imaginary interviews or visits. *Compare Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

[20] Of the six statements that petitioner continues to challenge, five appear to fall in this category—that Anna Freud and Kurt Eissler viewed petitioner as "'an intellectual gigolo—you get your pleasure from him, but you don't take him out in public'" (J.A. 14); that petitioner would turn the Freud house into a place of "'sex, women, fun'" (J.A. 12); that petitioner said of his remark about the sterility of psychoanalysis in his otherwise-respectful paper delivered to analysts in New Haven, "'I don't know why I put it in'" (J.A. 15); that petitioner changed his middle name to "Moussaieff" because "'it sounded better'" (J.A. 13); and that petitioner stated, "'well, he had the wrong man,'" in response to Eissler's suggestion that petitioner do the honorable thing of remaining silent about his dismissal (J.A. 13). The fact that petitioner made those statements, although perhaps relevant to whether readers would believe them, is not itself defamatory. Any damage to reputation would occur, instead, because readers believe the state-

ply from the fact that the plaintiff said what he said—for example, that he was the best lawyer in the country.[21] Whereas the defamatory meaning of the latter depends on the fact that the plaintiff himself made the statement, the defamatory meaning of the former, of course, would be conveyed regardless of whether the plaintiff or a third party had made the statement (if the reader believed it). In either event, it is one of those two meanings that must underlie a public figure's complaint of knowing falsity.

To demonstrate the necessary falsity, then, the plaintiff complaining of misquotation must show that the statement, in at least one of those two ways, conveys a message that differs in meaning from, and is more disparaging than, the concededly true message conveyed by a verbatim quote. (The verbatim quote must be taken as true in a case like this because the plaintiff himself spoke the words and thereby attested to their truth.) If that showing of a difference in meaning cannot be made, nothing material is added by complaining that the plaintiff did not actually use particular words.[22] A reader

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ments themselves—just as if each statement had been credibly made by a third party. *See* Pet. Br. 6-13.

[21] Only one of the statements that petitioner still challenges clearly involves this sort of message—that eventually analysts will say of petitioner that "after Freud, he's the greatest analyst who ever lived." J.A. 135. Of course, petitioner does not complain that his reputation would be damaged if readers believed the statement. He complains only that readers view him as arrogant, grandiose, and egotistical for having ascribed such high stature to himself. J.A. 16 (complaint). *See* Pet. Br. 9.

[22] In some cases, perhaps, the attribution of particular words could be significant in a way that might or might not be described as dependent on the meaning of the utterance. *Cf. Bindrim v. Mitchell, supra* (quotation falsely ascribed abusive and vulgar language to plaintiff). The present case involves no such complaint. Thus, any harm caused by the "greatest analyst" statement would not depend upon the particular language of the statement. Petitioner's complaint on this score would be no different if, for example, the quote had petitioner proclaiming that other analysts would eventually view him as the "most important" or the "best" analyst after Freud.

who believes the attributes ascribed by a substantively equivalent, but differently worded, statement does not come to a different and worse view of the plaintiff because of word choice alone. In such circumstances, the purely linguistic "falsehood" is not false in the sense relevant to defamation law. *See Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2706 n.7 ("falsity relates to the *defamatory* facts implied by a statement").

In short, there is no such thing as a cause of action for mere misquotation. Libel law is not concerned with differences of language that make no meaningful difference to the defamatory understanding to be drawn by an average reader from the challenged publication. That is true of descriptions of what a person did, and it is equally true of representations about what a person said.

2. *The Impact on Reputation.* The theory advanced by petitioner not only detaches actual malice from the kind of falsity that is at the heart of libel actions, it also disconnects malice from the interest that gives rise to such actions in the first place. In libel law, "the interest protected is that of reputation." *Prosser & Keeton* at 797. *See Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2702 ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 743-46, 771 P.2d 406, 426-28, 257 Cal. Rptr. 708, 728-30 (1989). If there is no difference of substance between what a reader believes about the plaintiff based on the quotation and what the reader would believe based on a verbatim transcript, then reputation could not be harmed by the difference in language.

The interest in protecting reputation is not just a matter of state law; it is, at bottom, the sole interest that justifies sanctions on the press for knowing falsity. This Court has so recognized on a number of occasions. More than a decade ago, the Court stated flatly: "*The* legiti-

mate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341 (emphasis added). In recent cases as well, while discussing the justification for allowing libel actions in certain circumstances, the Court has consistently identified only that one state interest as a legitimate ground for restricting freedom of speech. *See, e.g., Milkovich*, 110 S. Ct. at 2702, 2707-08; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986). When no injury to reputation is at issue, there is no good reason for the First Amendment to give way in defining the standards for liability, at least in an action specifically based on claims of defamation. As this Court has stated, it is "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349.

Urging the Court to "discourage" journalists from changing quotations, petitioner apparently seeks to suggest that libel actions can serve to regulate journalistic standards for their own sake. Pet. Br. 22, 28. This Court has made clear, however, that even an extreme departure from journalistic norms cannot by itself justify liability. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2685. No state has a legitimate interest in permitting libel or other actions for the sole purpose of holding publications to perceived journalistic standards, let alone a legitimate interest in setting such standards. By definition, that would be content regulation of the purest form, condemned by the First Amendment. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

It would, as a practical matter, be of great constitutional concern if states were allowed to inquire into immaterial departures from verbatim quotation for the purpose of disciplining the press. Most obviously, such

inquiries would produce expensive and burdensome libel litigation, turning largely on the meaning and application of proper journalistic standards. The question of standards governing use of quotations is a perfect illustration. As petitioner's *amici* show in the journalism materials that they have lodged with this Court, there is well-recognized variation in accepted practices regarding—and perennial debate about—the limits of permissible word changes in quotations.[23] Many such issues are continually under active debate, with no clear resolution and no fixed rules. It would be utterly inappropriate to make libel suits into a forum for such debates, allowing states to condemn and punish one set of practices, particularly without any interest in individual reputation at stake.

It is also plain that, given the realities of journalism, costly litigation over misquotation could readily become a tool of harassment. Journalists regularly interview subjects without making a tape recording of the conversation; the demands of journalism, especially perhaps daily newspaper writing, make that practice a necessity. *See, e.g.*, J. Olen, *supra*, at 98, 100; J. Hulteng, *supra*, at 69.[24] But if the rule advanced by petitioner were

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[23] M. Charnley & B. Charnley, *Reporting* 248-50 (4th ed. 1979) (setting forth debate over departures from verbatim transcription, noting view that the standard is whether quote "gives the reader accurate meaning and flavor"); G. Hough, *News Writing* 270-71 (2d ed. 1980) (approving practice of deviating from verbatim transcription of oral speech); J. Hulteng, *The Messenger's Motives . . .* 69-72 (1976) (at 71: "[S]ome working conventions have been built into the journalist's ethic where quotations are concerned. Even if every syllable hasn't been captured as uttered, even if every article isn't exactly in place, the quote can still be considered an acceptably accurate one if it honestly reflects what the speaker said."); J. Olen, *Ethics in Journalism* 98-100 (1988) (noting practices and policies regarding "reconstruct[ing] quotes after interviews," "condensing statements, correcting grammar, and improving vocabulary").

[24] In this case, a good deal of discussion with petitioner took place during Malcolm's week-long visit in Berkeley—in cars, on

adopted, any subject of an unrecorded interview could, by simple assertion, engage in full-blown litigation over the literal fidelity of a resulting quote. (Denials of quoted statements are, of course, a common feature of public life. *See Harte-Hanks*, 109 S. Ct. at 2698 n.37.)[25] The predictable result would be to discourage publications from using quotations, at considerable cost to the ability of the press to write readable stories and, therefore, to First Amendment values. *See* pages 28-30, *infra*.

This case hardly provides a sound basis for a new rule authorizing judicial discipline of the press. Contrary to the caricature drawn by petitioner and the dissenting judge below, the court of appeals did not give writers "license to invent quotations on the basis of what they perceive to be a speaker's character." Pet. App. A46 (Kozinski, J., dissenting); Pet. Br. 29.[26] This

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walks, etc.—without being tape recorded. J.A. 237-38. And Malcolm's tape recorder was broken during petitioner's visit with her in New York. J.A. 59.

[25] This case provides a telling example. In his initial complaint, and then in several of his amended complaints, petitioner denied making at least five separate statements that, it turned out, were on the recordings. *See* pages 4-5, *supra*. Without the tape recordings, petitioner would doubtless be demanding a jury trial about those quotations as well.

[26] Petitioner's exaggeration of the ruling below shows why his reliance on the D.C. Circuit's opinion in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (1984), *vacated and remanded on other grounds*, 477 U.S. 242 (1986), is misplaced. The present case does not involve the broad proposition rejected by the D.C. Circuit—"that the unchallenged portions of [the challenged] articles attribute to the [plaintiffs] characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage." *Id.* at 1568. As we note in the text, this case involves, at most, changes of words that preserve the specific meaning of the plaintiff's quoted statement. As to this situation, the only pertinent portion of *Liberty Lobby* actually supports our view. In a footnote, the court suggested that no liability could be imposed based on the "erroneous attribution of incremental evidence of a character flaw *of a particular type* which is

case narrowly concerns quotations that in most instances reflect only slight word changes from, and in all instances convey the same specific meaning as, what petitioner concededly did say in the interviews described. In other words, the case involves—and the ruling below extends no further than—quotations that would clearly be protected if the quotation marks were removed and the same thing were said in paraphrase. As we next discuss, no special set of rules of knowing falsity should distinguish paraphrases from quotations.

B. The First Amendment Prohibits the Imposition of Liability for Alleged Misquotations to the Same Extent as It Does for Other Alleged Misrepresentations of What the Plaintiff Said.

1. *The Impact of Speech.* Petitioner's position also makes an artificial, and ultimately pointless, distinction between the law applicable to quotations and the law applicable to other means of conveying what people say and mean. Although petitioner attempts to treat quotations as a unique category of speech—expressly distinguishing quotations from paraphrases (Pet. Br. 24, 26)—the line is largely illusory. For instance, it is self-evident that a paraphrase may convey precisely the same defamatory message as a quote. There is no material difference, for purposes of libel law, between "He said, 'I am promiscuous'" (quotation) and "he said that he is promiscuous" (paraphrase) or, for that matter, any number of other statements communicating the same basic fact (*e.g.*, "he admitted that he is promiscuous"). It is hard to see why a plaintiff would be deterred from bringing (or should be denied the chance to bring) a libel action—if the attribution is knowingly false and

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in any event amply established by the facts." In that type of case (more akin to, though still far broader than, the present case), the court explained, "the essentially derogatory implication" of such an attribution is not false. 746 F.2d at 1568 n.6 (emphasis added).

defamatory—simply because the author omitted quotation marks. The impact of that omission would not be materially different in the only terms relevant to libel law: what readers believed about the plaintiff. Knowing falsity of a paraphrase would be judged by the statement's meaning—by the attribute ascribed to the plaintiff.

It would, quite literally, elevate form over substance to have a different inquiry for quotations. Just as the omission of quotation marks does not provide an absolute defense to liability, the use of quotation marks should not create liability that would otherwise not exist. A quotation, like a paraphrase, is a defamatory falsehood only insofar as it falsely ascribes a defamatory attribute to the plaintiff: whether it is a literal copy of his spoken words is itself legally insignificant. If the quotation and the original statement both convey the same defamatory meaning, then the change in words has done no more harm than a paraphrase would have done. In that case—which is essentially this case (*see* pages 35-46, *infra*)—no legitimate interest is served by policing the linguistic difference.[27]

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[27] Petitioner's distinction between paraphrase and quotation is wrong not only for its assumption about what readers understand about the absence of quotation marks but likewise for its assumption about what readers understand about the presence of quotation marks. Petitioner, like Judge Kozinski, acknowledges that readers do not assume absolute fidelity to the original: at least grammatical and syntactical changes are understood to be incorporated in any lengthy quote, and certainly readers expect changes for other reasons as well. Pet. Br. 18; Pet. App. A74 (discussing elimination of repetition, digressions, false starts, for example). The changes that readers might expect to have been made in a subject's words surely vary from publication to publication and from context to context.

In the present context, it would be surprising if readers of the articles in *The New Yorker* or of *In the Freud Archives* believed that they were reading a verbatim transcript. Anyone who has tried to tell a long story—or to give a closing argument to a jury—knows that few people can do so spontaneously with the coherence,

A proper focus on the understanding of a reader—rather than the form of the message—thus makes clear the illogic of any attempt to treat changes of words in quotations as a distinct category of libel law, separate and apart from other ways of recounting what a person said without "full direct quotation." *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1970). Even in using quotations, a written work may be challenged as potentially injurious to reputation on the ground that it quotes particular sentences or phrases but not others, sets the quote in a particular context, quotes passages out of their original order, or eliminates words. *See* J. Hulteng, *supra*, at 72 ("In the boiling down, the selection of the key phrase or sentence, the reporter can do considerable violence to the theme of the original statement as the speaker intended it to be perceived.") Yet the law does not impose liability for such choices unless they create a different, defamatory meaning. There is no justification for creating and applying a different sort of analysis here: the substance of the allegedly false attribute ascribed to the plaintiff must be determinative.[28]

Petitioner, in fact, really seeks to have it both ways: when the words are different, he complains about the

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orderliness, lack of repetition, pacing, clarity, and careful phrasing that is found in written pieces like the book at issue in this case. Indeed, few if any speakers would even try to tell such a long story in an extended one-on-one conversation in just the way that they would write the story: many virtues of good writing would produce stultifying conversation.

[28] Although Judge Kozinski suggests a more elaborate analysis than does petitioner (Pet. App. A69-A88), it suffers from the same basic flaw: it concentrates on differences in words rather than differences in meaning. Thus, for example, although Judge Kozinski would require that any inaccuracies be "material," his explanation of "materiality" is largely concerned with whether the changes were merely "cosmetic" or made to "clean up peripheral aspects" of the speech at issue, not with whether they changed the meaning in a manner that would constitute falsity under the governing substantive law.

words; when the words are exact, he complains about the meaning. That is the teaching of his challenge to the quotation, "he had the wrong man." Pet. Br. 13; *see* pages 36-38, *infra* (discussing this quote in detail). He does not, and could not, claim that this quotation contains any words that he did not speak, only that he was not quoted in full. J.A. 215-16. Accordingly, petitioner does not challenge the rendition of the words themselves, but argues that editing of the passage effected a material change of meaning. For exactly the same reasons, however, he should be required to show a change of meaning (and knowledge or strong suspicion of that change) in challenging the remaining quotes as defamatory falsehoods.[29]

Petitioner also seeks to cut and trim his own theory, in essence creating specific exceptions to his general exception to the usual concept of knowing falsity. Thus, petitioner eventually acknowledges, as does the dissent in the court of appeals, that there may be knowing changes in quotations that do *not* necessarily result in knowing falsity.[30] But these obviously correct concessions are wholly incompatible with petitioner's main submission to this Court: that it is word change rather than alteration of meaning that is decisive, *i.e.*, that the ascription by quotation of any word not uttered is false and, if done knowingly, constitutes actual malice. Moreover, the principle behind the concessions cannot reasonably be limited by reference to the *purpose* of a particular

[29] Petitioner does not suggest that use of an ellipsis would have eliminated his complaint. In any event, although an ellipsis signals that material has been omitted, the signal would not immunize the passage if the omission changed the meaning in a defamatory way. Perhaps for that reason, it is in fact a common practice to omit ellipses in many forms of journalism. J. Hulteng, *supra*, at 73.

[30] Petitioner refers only to changes to correct errors of "grammar or syntax." Pet. Br. 18. Judge Kozinski, in his dissenting opinion, rightly referred to a wider range of changes that cannot support a finding of falsity. Pet. App. A74.

alteration: the purpose of a word change or addition—to improve grammar, syntax, or usage, to eliminate false starts and repetition, to add transitions, to put in words what was expressed by a nod responding to the interviewer's question—is quite irrelevant to the issue of falsity in libel law. It is only the impact on readers' understanding that matters, and it is therefore only the meaning of the quoted statement that bears on the question of injurious falsehood.

2. *The Need for Breathing Space.* The policies underlying the First Amendment requirement of actual malice apply as fully to quotations as to other types of statements. The basis of that protection in cases involving public figures like petitioner, who have entered the public arena and who may readily disseminate their own thoughts, is that freedom of the press—and therefore the dissemination of information and ideas—would be substantially impaired if authors and publishers curbed their writings out of fear of liability for statements that turn out to be false but whose falsity was not known or strongly suspected upon publication. *See, e.g., Gertz*, 418 U.S. at 340. The same harm to that core First Amendment interest would result if authors and publishers were held liable for departures from verbatim transcription without a known or suspected change of defamatory meaning. With quotations as with other statements, the First Amendment demands "breathing space" for journalism. *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2695; *Gertz*, 418 U.S. at 342.

This Court, in fact, has expressly recognized the need for breathing space in recounting the statements of others, with specific reference to quotations (albeit not word changes). *Time, Inc. v. Pape, supra.* In *Pape*, the Court noted that the task of recounting what people say "presents rather complicated problems. A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of

shadings. . . . Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." 401 U.S. at 286. The Court concluded that knowing or reckless falsity could not be found where Time, Inc., in making these choices of presentation, had adopted "one of a number of possible rational interpretations of a document that bristled with ambiguities." *Id.* at 290.

The breathing space provided by the actual malice standard is no less important for direct quotations, which, as noted above, are but one way of recounting what people say. There is no dispute that journalists may and do—indeed in many circumstances must—make changes in quotations. People typically do not speak in printable form, and they rarely do so at great length. *See* G. Hough, *supra*, at 271 ("The average person does not speak in complete sentences nor in direct and concise language."). Changes for publication are therefore routinely made to benefit the subject—to prevent him from looking foolish or unintelligent. J. Olen, *supra*, at 100 ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider."). More important, changes are made to benefit the reader. A verbatim transcript—here, running 1,056 pages and covering conversations that took place over more than 40 hours—could not and would not be read. Word changes and additions, like selection of quotations, editing, and placement, are essential to produce a readable text.[31]

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[31] As Judge Kozinski noted below: "the way most people talk is not particularly suitable for publication. There are many fragments and other grammatical abuses; the speaker will often say 'uh' and 'ah' and 'you know'; occasionally he will make a false start and go back and correct himself; he may introduce irrelevancies and go off on tangents. A conscientious reporter will try to fix some of these problems, both to make a more readable story and keep the speaker from looking foolish." Pet. App. A74.

Although petitioner (like Judge Kozinski) has tried to identify and isolate the acceptable grounds for modifications (Pet. Br. 18; Pet. App. A74), the effort is bootless: there can be no artificially defined list of permissible changes for writers, depending on a particular form or on a particular purpose or anything else. The only intelligible principle is one based on the common legitimate journalistic aim of improving communication without introducing material factual inaccuracy. Readers of publications are helped, and subjects of interviews well served, by journalistic efforts to "clean up" quotations without materially altering their meaning.[32] Indeed, changes that make a story more readable affirmatively serve the First Amendment value of promoting dissemination of information and ideas, attracting and retaining more interested readers. *See* M. Charnley & B. Charnley, *supra*, at 248 ("a story written word-for-word 'contains a lot of the verbiage, bypasses, and repetitious figures of speech with which most of us adorn our spoken words. No man can impugn its accuracy; the question is, will anybody except the hero of the speech read it?' "). That benefit would be lost if penalties attached to any changes resulting from journalistic efforts to serve the reader while preserving meaning.

It is true, of course, that authors could refrain from quoting at all or as much, resorting (as petitioner suggests) to paraphrasing the statements instead. But that cure—which, as we have said, would make no real difference to any interest in protecting reputation—would have serious side effects on the uninhibited presentation of ideas

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[32] One group of *amici curiae* supporting petitioner expressly agrees that liability should not attach to many changes in quotations, putting forth a standard that, in our view, should apply to *all* changes in quotations: "Reporters are at risk only if their 'clean-up' actually distorts the speaker's *meaning* in a defamatory way, and even then the distortion must reflect actual malice." Brief *Amicus Curiae* of Certain Journalists and Academics 13-14 n.4 (emphasis added).

and opinions. A story that substitutes paraphrases for quotations is often a less readable story: quotations add significantly to a story's immediacy and pacing and to readers' comprehension. J. Stovall, *Writing for the Mass Media* 110 (2d ed. 1990). Yet the result of a reduced First Amendment protection for quotations—grounded in the notion of a "falsity of words" advanced by petitioner—would be a persistent disincentive to use quotes in many circumstances, for spoken words are often unusable in their original form. This sort of pressure to avoid quotation would exact a serious, and wholly unnecessary, toll on First Amendment values.

II. SUMMARY JUDGMENT WAS PROPER IN THIS CASE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE ACTUAL MALICE WITH CONVINCING CLARITY.

A public figure like petitioner must, to establish actual malice, prove the defendants' subjective awareness of defamatory falsity with "convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 511 & n.30. That heightened standard of proof requires "clear and convincing evidence" that the truth was in fact seriously doubted before the courts can "strip the utterance of First Amendment protection." *Ibid.* For the reasons discussed above, in a case involving alleged misquotations, the plaintiff must show a change of defamatory meaning known or strongly suspected by the defendants upon publication. If the plaintiff cannot come forward before trial with "affirmative," "concrete" evidence sufficient to meet that high standard, summary judgment must be entered against him. *Anderson v. Liberty Lobby*, 477 U.S. at 256-57.[33]

[33] This Court has not spoken on whether, in a public figure libel case, falsity itself must be proved by clear and convincing evidence. The lower courts have divided on the question. *See Harte-Hanks*, 109 S. Ct. at 2682 n.2. We think that such proof should be required because it is hard to see how a factfinder could find awareness or

Both courts below correctly recognized that petitioner cannot meet this burden. Even if the field of inquiry is restricted to the recorded conversations—and the notes taken by Malcolm are not considered [34]—petitioner cannot

knowledge of falsity with convincing clarity while being only marginally persuaded of the falsity itself. In our view, however, that question need not be reached in this case.

[34] Of course, Malcolm's notes from petitioner's May 1983 four-day visit with her and her husband in New York (J.A. 112-15), which are disputed by petitioner, positively confirm not only that petitioner's meaning was not altered but that petitioner uttered exactly the contested words of three of the quotes at issue—the "intellectual gigolo" quote, the "sex, women, fun" quote, and the "greatest analyst" quote. Although the courts below put those notes aside, correctly concluding that summary judgment was required even without reference to them, it would have been proper for the courts below to rely on those notes. Petitioner, we think, could not establish their lack of authenticity, much less by the required clear and convincing evidence.

Whether petitioner can meet his burden depends not only on his own evidence but on the weight of that evidence relative to respondents' evidence. With respect to the notes, petitioner's current evidence consists of (a) his vehement denial that he uttered the quoted words and, in a very carefully worded statement, his denial that he "ever held such a conversation with Malcolm" when he visited New York in May 1983 (Pet. Br. 4 & n.1); (b) the unelaborated deposition testimony of William Shawn, editor of *The New Yorker* in 1983, that Malcolm told him that all of the quotes in the article came from the tapes (J.A. 223-24); and (c) a letter Malcolm dictated over the telephone to *The New York Times* (J.A. 222-23). The evidence to the contrary is that (a) the *Times* letter by its terms does not in fact say that all of the quotes were taken from the tapes; (b) Malcolm attests to the authenticity of the notes (J.A. 52); (c) Malcolm denies that she ever told anyone that all of the quotes came solely from the tapes (J.A. 83); (d) a letter petitioner wrote to Malcolm immediately after the May 1983 visit refers back to his discussions with Malcolm during the visit and shows that they did in fact discuss some of the subjects reported in the notes (J.A. 240-41); (e) the notes were turned over to respondents' counsel in December 1984, 19 months before petitioner had ever complained about the "intellectual gigolo" quote, yet that quote appears in the notes verbatim (J.A. 112, 115); (f) it is overwhelmingly implausible that petitioner did not discuss the subjects

prove that any of the challenged quotations are materially false in meaning. Still less can he prove by clear and convincing evidence that respondents, at the time of publication, knew of any discrepancies in defamatory meaning or seriously doubted that the published quotes accurately preserved the substance of what petitioner said.

A. Petitioner Must Show a Reasonably Evident Difference in Defamatory Meaning in Order To Demonstrate By Clear and Convincing Evidence That Respondents Recognized That There Might Be Such a Difference and Then Disregarded It.

Although proof of actual malice naturally takes account of proof of falsity, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 778, proof of falsity is not itself proof of actual malice. *Harte-Hanks*, 109 S. Ct. at 2692-93; *Bose Corp.*, 466 U.S. at 511. Even if petitioner could show a material difference in meaning with respect to any of the quotations, he would still have to show that, at the time of publication, the respondents were actually aware of or strongly suspected such falsity, taking into account the numerous reasons why such awareness might not be present. As applied to alleged misquotations, this requirement means convincingly clear proof—giving due regard to all of the reasons that a journalist might legitimately select or alter quotes to produce a readable, coherent, clear story—that the author or publisher was actually aware that the choices of words might produce material changes of meaning.

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written about in her book (J.A. 65) during his four-day stay in New York to meet with his publisher; and (g) there is nothing about the notes themselves that could support an inference of lack of authenticity—in particular, nothing in them is out of step with the substance and tone of petitioner's statements on the tapes.

If all of this evidence is considered as a whole, petitioner has not made out a case of actual malice with convincing clarity. All that petitioner could add at trial would be his own credibility. That, we think, would not be enough to meet his burden.

To put this inquiry into context, it is important to note that petitioner has produced no direct evidence—for example, memoranda or statements by respondents—indicating that any of the respondents knew or suspected that the challenged quotations departed in meaning from his spoken words. Pet. App. B6 ("No direct evidence of actual malice exists.").[35] Nor has he produced any circumstantial evidence of the sort, for example, that this Court relied upon in upholding a finding of actual malice in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2693-94.[36] Petitioner's claim of actual malice

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[35] Petitioner seeks to use Malcolm's notes to support his own case, arguing that if he could prove that Malcolm's testimony about their authenticity should be disbelieved, such proof would be affirmative evidence of actual malice. Pet. Br. 46. He also suggests that the editorial changes in the manuscript, and a sentence of testimony by the former editor of *The New Yorker*, support his claim of actual malice. Pet. Br. 45-46. But none of that is particularly probative, let alone clear and convincing evidence, of actual awareness that *meaning* was altered on publication where, as here, no reasonably apparent material difference in meaning can be shown. The bare accusation that notes have been "fabricated" or that attributed quotations are inaccurate, which could be made in virtually any case, cannot be regarded as sufficient to defeat a summary judgment motion without impairing the "breathing space" recognized by this Court as essential to the operation of a free press. We also note that this Court said in *Bose Corp.*, 466 U.S. at 512: "Normally . . . discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Even less would it be sufficient to support a finding of actual malice with convincing clarity.

[36] Petitioner's evidence of actual malice is, in fact, remarkably sparse when contrasted to the evidence that this Court found sufficient in *Harte-Hanks*: the defendant newspaper was politically motivated to injure the plaintiff, a candidate for office in an imminent election; the defendant refused to interview the one witness who could confirm or deny the allegation, although it interviewed many others; numerous other witnesses to the disputed event, some of them explicitly believed by the defendant's staff, denied the allegation; the defendant refused to listen to a critical tape recording, although it knew the tape was crucial and it purported to be actively considering whether or not to endorse the plaintiff; the defendant ran a story setting the stage for the defamation even before interviewing

thus stands or falls with differences in the words themselves. But, to support a finding of actual malice, it would not be enough for differences—if there were differences—to be subtle or hidden; rather, they would have to be reasonably apparent. As a matter of logic, it typically cannot be "convincingly clear" that the author recognized a material difference in meaning if that difference is not facially evident.[37]

As the courts below recognized, analysis of the significance of any differences is, as an initial matter, a judicial task. California law makes clear that, before a jury question can arise, the courts must examine the particular disputed passages and, construing them in the context of the entire work, determine what an average reader could reasonably interpret the challenged statements to mean. *See Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d at 261, 721 P.2d at 91, 228 Cal. Rptr. at 209-10; *Kilgore v. Younger*, 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661; *Jennings v. Telegram-Tribune Co.*, 164 Cal.

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any of the relevant witnesses; and the defendant's witnesses gave contradictory testimony on whether an investigation was undertaken. 109 S. Ct. at 2693-94.

[37] In *Bose Corp.*, for example, the Court recognized that a finding of actual malice could not rest on the obscure difference between sound wandering "about the room" and sound wandering "along the wall." 466 U.S. at 511-14. A requirement of obviousness of different meaning also undergirds the Court's holding in *Time Inc. v. Pape* that selection of one reasonable interpretation of an ambiguous statement could not support a finding of knowing or reckless falsity. 401 U.S. at 290. And on several occasions the Court has expressly referred to the presence of some kind of obvious departure from truth—as applied here, from the meaning of the original words—as a basis of liability. *See Harte-Hanks*, 109 S. Ct. at 2696 (recklessness can be found where there are "'obvious reasons to doubt the veracity of the informant or the accuracy of his reports'") (quoting *St. Amant v. Thompson*, 390 U.S. at 732); *Gertz*, 418 U.S. at 348 (minimal fault requirement in private figure case permissible at least if "the substance of the defamatory statement 'makes substantial danger to reputation apparent'") (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967)).

App. 3d at 126-27, 210 Cal. Rptr. at 488-89 ("A publication is not responsible for every strained interpretation a plaintiff might put on its words.") (internal quotations omitted); *see Forsher v. Bugliosi*, 26 Cal. 3d 792, 805-06, 608 P.2d 716, 723, 163 Cal. Rptr. 628, 635 (1980). Moreover, in applying constitutional standards, this Court has followed a similar course, determining how the allegedly defamatory material would reasonably be interpreted. *See Milkovich*, 110 S. Ct. at 2704-07; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 284-85 (1974). Performing that task, the courts below concluded that petitioner was unable to show that material differences in defamatory meaning were so obvious from any claimed departures from verbatim transcription that a jury could infer respondents' knowing or reckless disregard of such differences.

B. Petitioner Has Not Shown Actual Malice With Respect to Any of the Challenged Quotations.

We review each of the six challenged quotes below. Even if there were differences in meaning between the quotations and passages in the tape transcripts—a proposition that we dispute—there are certainly no differences apparent enough to support a finding, by clear and convincing evidence, that respondents must have understood any differences in words to have altered meaning in a defamatory way.[38] This is particularly so when considered in light of

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[38] The inquiry is not made in a vacuum; rather it must be made with the knowledge of the writing process here: respondent Malcolm listened to and took notes from the tapes, then typed up those notes (along with notes from untaped conversations), and wrote the articles based on those notes; and at each stage—in the initial note-taking, the typing, and the drafting—she "cleaned up" the quotations for use in a coherent and readable story. *See* J.A. 83, 52, 116. (There was no transcript of the 40-50 hours of tapes until this litigation commenced.)

Malcolm's attestation that she understood petitioner to have made precisely the challenged statements or their equivalents in meaning. *E.g.*, J.A. 60, 116-22. For this and other reasons, none of the challenged quotes is actionable.

1. "*Wrong Man.*" Petitioner challenges one quote on the ground that his meaning was distorted by Malcolm's selection of his words from the tape transcript, not by any asserted attribution to him of words he did not utter. The book describes Dr. Eissler's pressing of petitioner to keep silent about his firing so as, in petitioner's words, not "'"to poison Anna Freud's last days."'" J.A. 215. Petitioner resisted. The book quotes petitioner describing the conversation as follows:

> "[Masson:] 'What have I done? *You're* doing it. *You're* firing me. What am I supposed to do—be grateful to you?' [Eissler:] 'You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence.' [Masson:] 'Why should I do that?' [Eissler:] 'Because it is the honorable thing to do.'"

J.A. 215. Masson is quoted as then saying to Malcolm: "'Well, he had the wrong man.'"

Petitioner complains that the quotation has him confessing to being dishonorable. Pet. Br. 39. Quite simply, that is not a reasonable reading of the passage. Rather, the evident meaning is an entirely nondefamatory one—that petitioner did not view keeping silent as an honorable course of action. A major theme of petitioner's lengthy remarks throughout the book—indeed, the premise of his giving more than 40 hours' worth of interviews on the subject—was precisely that he disagreed with the psychoanalytic establishment's penchant for secrecy.[10] An aver-

[10] For example, immediately before the "wrong man" quote, the book reports that petitioner decided that he could not and would not remain silent about the meeting at which he was fired, notwithstanding an initial promise to do so. *In the Freud Archives* at 67. The book also reports that petitioner challenged his firing from the Freud Archives, in a lawsuit, partly on the ground that the firing was designed to cover up the truth. *Id* at 140-41. In addition, the book notes that petitioner refused a substantial offer of severance pay from the Archives, saying, "'I thought it was hush money.'" *Id.* at 148.

Petitioner's opposition to secrecy in the psychoanalytic world is also a major theme of his new book, *Final Analysis* (1990). *See id.* at 1-4; *see also id.* at 183 (likening such secrecy to government secrecy).

age reader of the articles or book must have understood that and so interpreted this passage. The alternative reading suggested by petitioner is so implausible that a reader could not reasonably have adopted it—that, although the book as a whole makes perfectly clear that petitioner firmly believed that he was right in refusing to keep silent, he really believed that he was acting dishonorably in speaking openly and publicly of his firing. It would require a strained reading to construe the challenged passage as containing such an unlikely and out-of-character confession. *Jennings*, 164 Cal. App. 3d at 127, 210 Cal. Rptr. at 489 ("'A publication is not responsible for every strained interpretation a plaintiff might put on its words.'") (citations omitted).

We also think that the quote conveys no message not contained in the tape excerpt from which it was taken. Petitioner recounted his conversation with Eissler:

> I said, "What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you?["] He said, "Well, you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence." "Fuck you," I said, "Why should I do that? Why? You know, why should one do that?" "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and

> humbly accept our judgment, who knows that in a few years if we don't bring you back?" Well, he had the wrong man. Really, I mean, that's just not, not for me.

J.A. 215-16. Malcolm has attested that she did not believe she was altering the meaning when she selected a portion of this passage for inclusion in her book. J.A. 52. The differences between the tape version and the published version cannot establish the contrary.

Finally, at most, the excerpting of petitioner's account of and comment about his conversation with Eissler amounted to selection of one rational interpretation of an ambiguous statement. That is enough to defeat liability under *Time, Inc. v. Pape*, 401 U.S. at 290. There, this Court found no actual malice in the selective presentation of quoted statements, applying precisely that standard.

2. *"Intellectual Gigolo."* Petitioner challenges one phrase in a passage in which he first recounts a lover of his saying that "'"it's very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room."'" Petitioner then goes on to say, "'And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.'" J.A. 94. The passage concludes with petitioner reporting what he viewed as a private confession by Anna Freud that her father would not choose to become an analyst if he were alive today. *Ibid.* Petitioner complains that he did not use the phrase "intellectual gigolo" and that its appearance in the quote conveys the false and defamatory message that his "intellect was for sale" and that he "had been willing to be dishonest about the views

he purportedly held in his scholarship and intellectual activities" for personal gain. J.A. 14.

The first flaw in petitioner's contention is that this passage is no longer properly in the case. The court of appeals held that, even aside from the question of actual malice, the passage was not actionable under state law. Thus, in one of its alternative rulings rejecting this particular claim, the court held that the passage "is not defamatory." Pet. App. A15. Petitioner did not challenge that ruling in his petition. Indeed, he could hardly have done so, because the holding that the statement was not so injurious as to constitute defamation could only have been a matter of state law.[40] The court of appeals also held that the passage was not actionable because it caused no incremental harm to his reputation beyond that inflicted by the "nonactionable remainder of the publication." Pet. App. A15-A16. That ruling too—described by the court of appeals itself as a conclusion that the statement is "nondefamatory" for that reason as well (Pet. App. A15) and having nothing to do with the federal requirement of actual malice—is most sensibly understood as involving only a question of state law.[41]

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[40] Moreover, petitioner is hardly in a position to dispute the finding that the phrase is not defamatory, as he did not think to complain of the quote until his fourth amended complaint, which was filed almost two years after his original complaint and only after petitioner had reviewed the tape transcripts and determined that the phrase did not appear there. It is hard to imagine why, if petitioner found the phrase defamatory, he failed to challenge it for so long—unless, of course, petitioner knew that he had actually used the phrase in New York, as reflected in Malcolm's notes.

[41] California case law appears to support the concept of incremental harm. *See Reader's Digest*, 37 Cal. 3d at 266, 690 P.2d at 624-25, 208 Cal. Rptr. at 151-52. Certainly petitioner has not argued or shown the contrary. Even if California law were otherwise, however, we think that the First Amendment would itself bar imposition of liability for speech that causes no incremental harm to reputation. *See* pages 19-23, *supra*.

In any event, there can be no proof that the challenged phrase conveyed to a reasonable reader a different meaning from that conveyed by petitioner's words on tape, let alone convincingly clear proof that respondents were aware of this different alleged meaning—*i.e.*, that petitioner tailored his thoughts to fit the tastes of his benefactors. The passage as a whole was drawn from several portions of petitioner's remarks on tape: petitioner reports his lover's remarks about his being a private pleasure but a public embarrassment (J.A. 95), explicitly agrees with Malcolm's analogy to Kurt Eissler's and Anna Freud's view of him (J.A. 95-96), describes how "charmed" Eissler and Freud were in private by his "irrepressible" manner (J.A. 97, 99), and reports Anna Freud's private remark about her father not being an analyst today, stressing that "she would never, ever say that in public" (J.A. 100-01). Petitioner's challenge, then, rests on the contention that, despite the accuracy of the context, use of the phrase "intellectual gigolo," standing alone, so clearly could convey the alleged defamatory meaning to a reasonable reader that Malcolm must have recognized it but employed the phrase nevertheless. That argument, we submit, is wholly implausible.

Even if the phrase had been invented by Malcolm—which it was not, as Malcolm attests (J.A. 53, 118) and her notes make clear (J.A. 115)—addition of the phrase did not alter the meaning reasonably conveyed, let alone do so in an evident manner. The phrase, "intellectual gigolo," of course, does not stand alone; it is immediately followed by a dash and clause explaining precisely what meaning is intended—that petitioner gave Eissler and Freud intellectual pleasure in private but could not be acknowledged in public. The particulars of the remainder of the quote also make clear that the explanation following the dash is the meaning both intended and reasonably understood. Petitioner's alternative reading, moreover, would be deeply inconsistent with what a reader would

reasonably understand from the rest of the book—that, far from selling himself out intellectually, petitioner was steadfastly and indeed passionately committed to his views; and that Eissler and Freud were charmed by him, not because he altered his views to fit theirs, but because they enjoyed his brashness and boldness and because at least Eissler enjoyed flirting with his unorthodox ideas. *See, e.g., In the Freud Archives* at 20-21, 28-29, 90, 150-51. The only reasonable reading of the challenged phrase, therefore, is that petitioner was, to Eissler and Freud, a purely private pleasure—a meaning that accurately conveys what petitioner himself said repeatedly on tape.[42] Petitioner has not demonstrated that respondents had any different understanding.

3. *"Sex, Women, Fun."* Petitioner challenges the quotation of him saying that, if he had been allowed to take over the Freud house in England, it "would have been a center of scholarship, but it would also have been a place of sex, women, fun." J.A. 126. This quote, however, was twice found by the district court to be substantially true (Pet. App. B22-B23, C7-C8), and the court of appeals evidently agreed with that holding (Pet. App. A17-A18). The holding of substantial truth is one of state law and is unchallenged in the petition; thus, there is no reason for this Court to address the issue of actual malice.

In any event, actual malice could not be established, because, as the holding of substantial truth would compel,

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[42] Petitioner incorrectly alleges that the court of appeals resolved against him the factual issue whether he ever used the words "intellectual gigolo." Pet. Br. 41-42. All that the court of appeals did was to observe in a footnote that petitioner's vehement denial that he used the phrase was insufficient to establish actual malice by clear and convincing evidence, because petitioner "indisputably made numerous statements which were the substantive equivalent of the 'intellectual gigolo' quote." Pet. App. A13 n4. In fact, the court of appeals explicitly stated its assumption that "it may be true that Masson did not use the words 'intellectual gigolo.'" Pet. App. A15.

there is no noticeable discrepancy of meaning between the quote and what petitioner admittedly said. In addition to recounting his general promiscuity and his "always" having brought along mistresses on his visits with Eissler (*e.g.*, J.A. 128-30), petitioner said, in particular, when describing his relationship with a London psychoanalyst: "'[H]e's fun. I like him. . . . [I]t was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs] . . . going to really, we were going to live it up.'" J.A. 129.[43] Petitioner could not establish a change of meaning from his own statements, let alone a knowing change of meaning.

4. *"I Don't Know Why I Put It In."* Petitioner further complains of a quotation contained in a passage that begins with Malcolm noting her own ponderings about what led petitioner so dramatically and suddenly to alter his stance toward psychoanalysis—to change, between the time of the New Haven paper and the time of the conversation with Malcolm, from "a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become." J.A. 175. The passage notes that the tone of the New Haven paper was, for the most part, scholarly, quiet, sober, tedious in places, and "respectful of psychoanalysis and of Freud." *Ibid.* The passage then says that Malcolm told petitioner of her perception of the change and asked him for an explanation, continuing:

> Masson sidestepped my question. "You're right, there was nothing disrespectful of analysis in that paper,"

[43] Petitioner is apparently referring to this quotation when he admits to saying that he and another analyst "would introduce women to each other." Pet. Br. 9. This change in description—from "pass[ing] women on to each other" to "introduc[ing] women to each other"—shows quite well how a paraphrase may distort meaning. *See* pages 23-27, *supra*.

> he said. "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in. The paper was very scholarly, and I thought analysts would be fascinated by my discoveries and would receive them with great warmth. But something causes analysts to ignore my material and to focus on me."

Petitioner challenges one piece of the quotation, "'I don't know why I put it in.'" Pet. Br. 39-40.

Even if petitioner did not speak the exact words quoted—and Malcolm testified that Masson had done so in one of their unrecorded conversations (J.A. 179)—the challenged part of the quotation does not materially differ in meaning from petitioner's acknowledged statements. In the taped interviews, petitioner agreed that the New Haven paper, but for the last sentence asserting the sterility of psychoanalysis, was "still well within the analytic tradition" and "really not a deep criticism of Freud," and he described the final sentence as "an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts." J.A. 176. (Petitioner also said in a letter to the Board of Directors of the Freud Archives that the remark "was unfortunate, and poorly worded." J.A. 177-78.) These statements convey what Malcolm (correctly) understood the disputed quotation to convey—that petitioner's inclusion of the remark about sterility in the otherwise respectful paper "was an impulsive decision." J.A. 180.

Petitioner's only response is that the quotation conveys a false meaning because he told Malcolm that he made the remark because he thought it true. Pet. Br. 11. But that is not responsive to the question addressed by the passage and the quotation—why, believing the sterility remark, petitioner chose that particular occasion to make it, since it was offensive to his audience and out of keeping with the tone of the paper as a whole. There is simply no reason to doubt that Malcolm (correctly) understood petitioner not to have an adequate answer to

that question. Accordingly, there could be no proof that she believed the challenged quote to be anything but perfectly faithful to petitioner's meaning."

5. *"It Sounded Better."* Petitioner seeks to recover for the quote in which, after explaining that his grandfather had changed the family name of Moussaieff to Masson in the 1920s, he says: " 'My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.' " J.A. 87. On tape, petitioner had said: "I changed my middle name. I didn't like it." J.A. 87. When asked why, he said: "I just liked it. . . . You know, it was sort of part of analysis: a return to the roots, and your family tradition and so on." J.A. 89. Malcolm testified that she perceived no difference in meaning between the quote in the book

" Petitioner has dropped his challenge to the book's statement that he "sidestepped" Malcolm's question. That challenge, of course, does not involve misquotation. And the statement was, in any event, Malcolm's view, well-supported by the tapes, that petitioner never did explain to her satisfaction why his particular discoveries and his disagreements with received psychoanalytic learning led him to become such a radical anti-Freudian, when at least initially he expressed some of those views well within the tradition.

We note, in addition, that it is by no means clear what damaging message petitioner believes the quotation falsely to convey. Petitioner's brief suggests only that the quote made it appear that he "thoughtlessly" included the statement, but that is in essence what petitioner said on tape. In his complaint, petitioner said that the entire passage portrays him as "an unprincipled person with no ability or scholarship to back up his positions on Freud, when in truth and in fact MASSON repeatedly gave MALCOLM reasoned explanations for those views, which explanations MALCOLM expressed." J.A. 15. That statement, aside from focusing chiefly on Malcolm's own words rather than on the quotation, carries with it its own refutation, for the remainder of the book elaborately explains the basis for petitioner's positions on Freud. Against that background, the present passage could only be read to indicate, not petitioner's lack of principle or scholarship, but the lack of a satisfactory psychological self-explanation for his overall ideological transformation based on his limited historical findings. It is hard to see how that suggestion is either false or defamatory.

and petitioner's tape-recorded remarks. J.A. 92. If there is any difference between "it sounded better" and "I just liked it," it is hardly sufficient to show clearly and convincingly that Malcolm believed that a reader of the latter would have a different (and more negative) understanding of Masson than would a reader of the quote as it appeared in the book. Moreover, it is clear from the immediately preceding sentence in the article that petitioner did not pick the name "Moussaieff" randomly, but took on a family name, and thus the passage accurately conveyed the idea that he was acknowledging his family and his roots.

6. *"Greatest Analyst."* Finally, petitioner challenges the quote in which, in a telephone call made to Malcolm just after his book was accepted for publication, petitioner boasts that eventually analysts will view him, "after Freud, [as] the greatest analyst who ever lived." J.A. 135. (Petitioner again made such a statement during his May 1983 visit to New York to promote his book, as reflected in Malcolm's notes of that visit. J.A. 112-13, 135-36.) The gist of petitioner's complaint is that the quote would make a reader believe that petitioner had a grandiose, egotistical, arrogant conception of his place in the history of psychoanalysis. *See* Pet. Br. 40; J.A. 16.

That same meaning, however, is reasonably drawn from many statements of petitioner recorded on tape. For example, petitioner said: "for better or worse[,] analysis stands or falls with me now" (J.A. 137); "I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur [sic] Eissler and [certain others] against the rest of the world. Not so, it's me. It's me alone." (J.A. 139); and "Analysis was started in 1895 and . . . it died in 1982." (J.A. 140). He said that other analysts sensed that he was "a really critical danger [to psychoanalysis]. . . . [a]nd they were right. 'This man could singlehandedly bring down the whole business.' " J.A. 143. And

he predicted that when his book came out, "I really feel it spells the beginning of the end of psychoanalysis. . . . [Analysts will blame me] for having done psychoanalysis an irreparable damage. . . . I think that this book really is, uh, it's the end for them." J.A. 145.[45]

Petitioner contends that there is an important difference between what he admits saying on tape and how he is quoted in the book: he says that the former speaks only to his assessment of his work, not of himself. Pet. Br. 40.[46] (On tape, he agrees with Malcolm's assessment that his claims were "very grandiose" but says, "it's got nothing to do with me. It's got to do with the things I discovered." J.A. 137.) In this context, that is a distinction without a difference. Petitioner's place in the history of psychoanalysis could be based only on his discoveries (he is concededly not a practicing therapist, *see In the Freud Archives* at 30, 31), and there is no reason for Malcolm to have drawn any meaningful distinction between his assessment of his work and his assessment of his place in psychoanalysis. Certainly, in comparing the quote and what petitioner admittedly claimed about his work, one could not find a difference of substance that could, with convincing clarity, support an inference that the quote must have been used with awareness of a different (false and defamatory) meaning.

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[45] In his initial complaint, petitioner denied that he had ever said that "analysis stands or falls with me now" or that he "could single-handedly bring down the whole business." J.A. 260. He no longer contests the validity of those passages because they appear verbatim on the tapes. *See* page 4, *supra*.

[46] Although petitioner no longer mentions it in explaining his complaint (Pet. Br. 40), earlier in the case he complained specifically that the quote suggested on his part that eventually analysts would recognize his discoveries. That suggestion conveys no different defamatory meaning about petitioner's view of himself than the "greatest analyst" quote.

C. Petitioner Has Not Independently Shown Actual Malice on the Part of the Publishers.

If respondent Malcolm was entitled to summary judgment, then, as the court of appeals held, respondents The New Yorker Magazine, Inc., and Alfred Knopf, Inc., who published the articles and book, were likewise entitled to summary judgment. Pet. App. A30. Petitioner has not challenged that aspect of the court of appeals' holding. Indeed, the publishers could not be found to have published with knowing or reckless disregard of false meaning for the very same reasons that Malcolm could not be found to have written with such disregard. There was no more falsity of meaning, and no greater basis for knowing or suspecting such falsity, when the publishers examined the piece than when Malcolm wrote it.

In any event, the publishers would be entitled to summary judgment even if Malcolm were not. Petitioner must show actual malice as to each defendant to prevail. He could not make such a showing, certainly not by clear and convincing evidence.

Knopf, which had entered into a standard form of independent contractor publishing agreement with Malcolm, was entitled to rely on her as a known trustworthy writer whom it had published before.[47] Petitioner has put forth no evidence that could show that Knopf's reliance on Malcolm was overcome by some ground giving it knowledge or strong suspicion of falsity. Petitioner's only evidence is that Knopf editor-in-chief Robert Gottlieb heard about a complaint that Masson's counsel made to The New Yorker, but he does not point to any par-

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[47] *See Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 959 (D.D.C. 1976); *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d at 259, 690 P.2d at 619, 208 Cal. Rptr. at 146; *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595-96, 550 N.Y.S.2d 251, 255 (1989), *cert. denied*, 110 S. Ct. 2168 (1990).

ticulars of the complaint that must have engendered doubts in Knopf about the meaning of the quotations now being challenged. Pet. Br. 14.[48] A general complaint (in this case, not even to Knopf) does not give rise to a duty to conduct an independent investigation, much less establish actual malice. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d at 1569; *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d at 260, 690 P.2d at 620, 208 Cal. Rptr. at 147.

As to respondent The New Yorker, petitioner has argued vicarious liability based on a supposed employment relationship between Malcolm and The New Yorker. But the evidence is clearly to the contrary, because Malcolm had no obligations to produce any work for The New Yorker and the magazine had no contract with her specifying the nature or frequency of her work. *See* J.A. 244-46. When she did write an article, Malcolm was obliged to give The New Yorker what amounts to a right of first refusal. There is, therefore, no ground for vicarious liability. *See* 2 B. Witkin, *Summary of California Law*, Agency and Employment § 15 at 31 (9th ed. 1987) ("the right of control . . . determines the issue of employment or independent contract relationship").

Nor is there a basis for a direct finding of actual malice on the part of the magazine. Like Knopf, The New Yorker was entitled to rely on Malcolm as a known trustworthy source: she had written pieces for the magazine for almost 20 years before 1983. J.A. 278-79. Against such reliance, petitioner weighs in only with his complaint to a fact-checker, who had called him, about

[48] Indeed, Masson testified about Gottlieb: "I suspect he believed Janet Malcolm. He probably asked her—after all, they see each other. . . . [C]ertainly I don't believe Mr. Gotlieb [sic], if he knew that they were false, would have gone ahead and published it. I think he was negligent in not finding out, but not dishonest." J.A. 248.

the accuracy of non-defamatory details unrelated to the quotes now at issue. Given that petitioner has not shown that he demonstrated any material inaccuracy to The New Yorker before publication, particularly with respect to the quotes later challenged, there is no sufficient evidence to conclude that The New Yorker published the piece with serious doubts about the truth of the statements challenged in this lawsuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES W. KENADY
KARL OLSON
COOPER, WHITE & COOPER
101 California Street
Suite 1600
San Francisco, CA 94111
(415) 433-1900

JOSEPH H. COOPER
THE NEW YORKER
25 W. 43rd Street
New York, NY 10036

H. BARTOW FARR, III *
PAUL M. SMITH
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

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October Term, 1990

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

CHARLES O. MORGAN, JR.*
PAUL RICHARD KLEVEN
LAW OFFICES OF
CHARLES O. MORGAN, JR.
450 Sansome Street, Suite 1310
San Francisco, CA 94111-3382
Telephone: (415) 392-2037
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

A. PROTECTION OF FALSE QUOTES WOULD SACRIFICE ALL FIRST AMENDMENT RIGHTS EXCEPT THOSE CLAIMED BY THE MEDIA

The Brief for Respondents makes no attempt to deny or minimize the danger posed to First Amendment values by a rule encouraging deliberately manufactured quotations, though the potential damage to free speech rights of misquoted speakers and their intended audience was addressed at length in Brief for Petitioner 28-31, Brief *Amicus Curiae* of Certain Journalists and Academics in Support of Petitioner 5-10, and Brief *Amicus Curiae* of Mountain States Legal Foundation In Support of Petitioner 5-9. Respondents' obvious, though unstated, premise is that the media's claim to First Amendment protection, however vague, obliterates any other constitutional interests in accurate quotation. This Court must not endorse respondents' skewed constitutional vision: "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

B. FABRICATED QUOTES CHANGED MEANING OF MASSON'S WORDS AND WOULD BE FALSE EVEN IF THERE WERE NO CHANGE IN MEANING

Largely abandoning the rationale of the Ninth Circuit's holding, respondents focus on the issue of falsity and ask this Court to impose a two-tiered burden of proof on those defamed by misquotation. (Resp. Br. 13-19, 32-35). Their suggested distinction between words and meaning would not affect the outcome in this case, which

involves the deliberate distortion of both, and is based on a misconception of the common law "substantial truth" doctrine. It is also inconsistent with the argument that a speaker's words should be treated as facts (Resp. Br. 14, 16-19) – if so, then a quote containing defamatory words never used by the speaker has to be considered false.

1. FABRICATIONS DIRECTLY CONTRADICTED ACTUAL STATEMENTS MADE BY MASSON

Contrary to suggestions in the opposing brief, Masson has always contended that respondents knowingly changed his words and his meaning. The fabricated quote, "I was like an intellectual gigolo," (J.A. 94), was not an "utterly insignificant" (Resp. Br. 13) change in wording from his actual comment that he was "a private asset but a public liability."[1]

---

[1] The Court should ignore the specious contention (Resp. Br. 39) that this petition does not challenge the Ninth Circuit's statement that "intellectual gigolo" was not defamatory. The first Question Presented addresses "quotations that are attributed to and defame a public figure." Under Supreme Court Rule 14.1(a) a question "is deemed to comprise every subsidiary question fairly included therein," and it would be pointless for the Court to determine whether Janet Malcolm fabricated a non-defamatory quote with actual malice. Where resolution of a subsidiary legal question is "predicate to intelligent resolution" of the question presented, the Court should consider it. See *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

The Ninth Circuit's decision turned on its determination that there was no actual malice; responding to an argument by the dissent, the majority also stated without citation to state or federal law that the quotation was not defamatory. (Pet. App.

(Continued on following page)

The fabricated quote implies that Masson was willing to prostitute himself intellectually, an implication that, as respondents acknowledge, is "deeply inconsistent" with what Masson said elsewhere in the article. (Resp. Br. 40-41). Incredibly, respondents argue that a reader confronted with this inconsistency would not conclude that Masson was an unprincipled hypocrite, but would attempt a benign reconciliation of "intellectual gigolo" with contradictory statements scattered throughout 130 pages of the article. (*Id.*) Actual readers of the article did not strain to find an innocent meaning for what Masson said, as shown by the severe criticism of him in reviews of the article. (See Pet. Br. 14-15; J.A. 80-81). Malcolm's

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A at A-15). The Court went on to cite the "incremental harm" theory discussed in two federal cases as a basis for finding the quotation non-defamatory, (Pet. App. A at A-15-1), and this was specifically addressed in the third Question Presented.

Respondents' other waiver arguments are no more persuasive. The Ninth Circuit did not hold that the "sex, women, fun" passage was substantially true, (Pet. App. at A-17, 18), as respondents suggest. (Resp. Br. 41). The first Question Presented addresses "publication" of fabricated quotations, clearly challenging the Ninth Circuit's failure to find liability on the part of Malcolm's publishers, (Pet. App. A at A-30), despite respondents' contrary claim. (Resp. Br. 47).

Finally, Pet. Br. 13 n.2 indicates that Masson continues to challenge all of the false quotes, though there is no need for this Court to analyze each passage addressed by the Ninth Circuit, and respondents' repeated claims to the contrary should be disregarded. (Resp. Br. 13, 17 n.20, 18 n.21, 43, 44 n.44).

knowledge that Masson consistently denied that his principles were for sale demonstrates that she knew he did not and would not ever call himself an "intellectual gigolo."

Respondents make the same misguided argument regarding Masson's purported statement that he was "the wrong man" to do "the honorable thing." (J.A. 215). The statement *was* totally "out-of-character," (Resp. Br. 37), but an average reader would not somehow intuit that Masson therefore actually meant that he "did not view keeping silent as an honorable course of action." (Resp. Br. 36). This unrealistically innocent gloss on the passage is closer to what Masson actually said, but his words had been altered so that the article conveyed the opposite meaning.

Malcolm was similarly aware of statements by Masson that contradicted other fabricated quotes:

WHAT MALCOLM KNEW MASSON HAD ACTUALLY SAID	WHAT THE ARTICLE SAID MASSON HAD SAID
"I felt I should say something because the paper's still well within the analytic tradition. . . . I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile and I believe that one, . . . " (J.A. 176).	"That remark about the sterility of psychoanalysis was something I tacked on at the last minute and it was totally gratuitous. I don't know why I put it in." (J.A. 175)
"I assure you when [my] book comes out, . . . there is not an analyst in the country who will say a single word in favor of it." (J.A. 136)	"Wait till it reaches the bestseller list and watch how the analysts will crawl," he crowed. "[T]hey will say that Masson, is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived." (J.A. 135).

2. "SUBSTANTIAL TRUTH" DEFENSE DOES NOT PROTECT FABRICATED QUOTES REGARDLESS OF WHETHER THERE IS A CHANGE IN MEANING

Each of the altered or fabricated quotes changed the meaning of Masson's words, causing a distinct damage to his reputation. But even if the manufactured quotes simply changed Masson's words, they would still be false quotes. The "substantial truth" doctrine relied on by respondents (Resp. Br. 15-16) does not protect those who invent new, defamatory charges:

> An allegation that the plaintiff embezzled $50 from the First State Bank cannot be proved substantially true with evidence that the plaintiff embezzled $100 from the Second National Bank. . . . Specific charges of particularized crimes cannot be refuted with general evidence of other, similar activity, or by an attack on the general bad character or misconduct of the plaintiff.
>
> Smolla, *Law of Defamation*, 5-18-5-19 (1990). *See also* Restatement (Second) of Torts §581A, comment f; Keeton, et al., *Prosser and Keeton on Torts*, 841-42 (5th ed. 1985); and Sack, *Libel, Slander and Related Problems* 139 (1980).

Minor inaccuracies in describing what actually happened (e.g., plaintiff stole $25,000 from the bank rather than the $50,000 defendant reported) are protected as substantially true, but inaccuracies that charge plaintiff with committing a different defamatory act are simply false. *Id.* Respondents therefore misstate the common law in arguing that, because they believe Masson is egotistical (general bad character) or made egotistical statements (other activity), they can invent any other egotistical statement and ascribe it to him. (Resp. Br. 45-46). Writers are no more entitled to fabricate defamatory words than they would be to fabricate defamatory acts.

If Masson had actually "crowed" that analysts would say he was the "greatest *therapist* who ever lived," Malcolm's fabricated quote that analysts would say he was the "greatest *analyst* who ever lived" (J.A. 135) might have been substantially true. Minor changes in wording to correct syntax or false starts would be protected because the quotes would still be substantially true but not, as respondents suggest, because of the purpose for the alteration. (Resp. Br. 26-27). Even wholly invented quotes would usually not be defamatory and, though false, would not prompt a lawsuit. But if a writer deliberately invents a false, *defamatory* quote, or uses fabricated quotes to place a speaker in a false light, the First Amendment should not immunize those calculated falsehoods.

3. "SUBSTANTIAL TRUTH" WOULD PROTECT ACCURATE PARAPHRASES, WHICH HAVE A DIFFERENT EFFECT ON THE AUDIENCE

Although the substantial truth defense cannot protect a writer who fabricates quotes, it would provide a

complete defense in any case involving an accurate paraphrase. By definition a paraphrase is "a restatement . . . giving the meaning in another form . . . . " Webster's Third New International Dictionary (1981). Any reader of a paraphrase would understand that the writer was restating the speaker's words, so the writer could truthfully provide any restatement that conveyed the same meaning as the actual words.

A writer's use of a direct quote evokes a different reaction from the reader, who rightfully understands, as Malcolm explained to the *New York Times*, that everything in quotes "was said by [the speaker], almost work for word. (The 'almost' refers to changes made for the sake of correct syntax.)" (J.A. 222). A writer who places invented words inside quotation marks is falsely stating that the speaker used those words.

Respondents' entirely unsupported contention that there is no distinction between a reader's perception of quotes as opposed to paraphrases (Resp. Br. 23-27) is not only contrary to common sense, (Pet. App. A at A-70-73 (Kozinski, J., dissenting)), but also at odds with a declaration of the *New Yorker's* famed former editor-in-chief: " 'the *New Yorker* "id.al is a verbatim quote." ' " (Pet. App. A at A-67 n.17) (Kozinski, J., dissenting). Precisely because direct quotes add to a story's immediacy and readability, (Resp. Br. 30), false quotes pose a more serious threat to reputation than false paraphrases. The reader believes the writer has *not* tampered with the quoted words, which damn the speaker far more effectively and irrefutably than would a faulty restatement.[2]

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[2] The concerns expressed in the Brief *Amici Curiae* of Home Box Office, Inc., et al. are seriously overstated precisely

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There is no reason to encourage writers to fabricate any quotes, even if they do later deny that they intended to change the speaker's meaning. (Resp. Br. 35-36, 38, 43-45). "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, . . . " *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Respondents' attempts to constitutionalize the "substantial truth" defense should fail. Their proposed requirements for establishing knowing or reckless falsity are based on a complete misstatement of that common law doctrine. Because this extravagant protection of fabricated quotes would interfere with free speech rights of public figures and the public, the Court should be even more reluctant than it was in *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706-07 (1990), to require an additional constitutional inquiry based on respondents' creation of an "artificial dichotomy."

C. RIGHT TO DOCTOR QUOTATIONS IS NOT IMPORTANT TO THE OPERATION OF A FREE AND ROBUST PRESS

Masson is not asking this Court to "regulate journalistic standards for their own sake." (Resp. Br. 20). If

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because of the different perception of the audience for movies and docudramas. Far from being the death of fiction, a victory for Masson would have no effect on works that are not of and concerning a particular real person, or that clearly state that the conversations are fabricated. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

journalists and journalism professors suddenly decided to encourage the deliberate alteration and fabrication of quotes (a position specifically rejected in the Brief of *Amici Curiae* The Times Inc. Magazine Company, et al. 2) respondents would still be liable for publishing the article with actual malice. The fact that quotations traditionally have served a particular journalistic function simply reinforces the conclusion that Malcolm and her publishers knew they were falsely representing to their readers that Masson had actually uttered the words in quotation marks. (Pet. Br. 25-26).[3]

One question never answered by respondents or by any of the *amici curiae* supporting them is whether fake quotes are "of a character" protected by the First Amendment. (Pet. Br. 24 (quoting *Harte-Hanks Communications,*

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[3] Brief of Association of American Publishers, Inc., et al. argues that the publishers should be immune from liability unless there was "persistent inaccuracy" that causes suspicion in the publisher's mind. (A.A.P. Br. 9-13). In this case, though Malcolm had told her editor that everything was on tape, *every* fact or quote checked by the *New Yorker* was false. (Pet. Br. 5-6). The *New Yorker* checked no more quotes, and knowingly published the false (but non-defamatory and so non-actionable) facts. Knopf, by the time it published the book, was aware that the accuracy was disputed and that a complaint had been lodged against Malcolm, (Pet. Br. 14), yet made only a minor alteration. As in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2698 (1989), the publisher's inaction would be evidence of actual malice, particularly where, in contrast to *Hotchner v. Castillo-Puche*, 511 F.2d 910, 912 (2d Cir.), *cert. denied sub nom Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977), all passages were easily subject to "independent verification" in the tapes.

Inc. v. Connaughton, 491 U.S. ___, 109 S.Ct. 2678, 2696, 2698-99 (1989))). This Court has required such an inquiry since *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), but respondents cannot justify what they did to Masson, and so do not attempt it. Although they ultimately acknowledge that true quotations have constitutional value beyond that of paraphrases, (Resp. Br. 29-30; *cf. id.*, 23-24), respondents cannot explain why deliberately altered and manufactured quotes must be encouraged in order to protect truthful quotation.

In the typical libel case,

> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.
>
> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)

That tension is absent here – there will be a vigorous press even if journalists are not encouraged to fabricate quotes, and when writers engage in such calculated falsehoods, "the public's interest in an uninhibited press is at its nadir. . . ." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 784 (1986) (Stevens, J., dissenting).

The media's undifferentiated desire to publish defamatory speech is not a sufficient basis for extending constitutional protection. Before increasing the risk of uncompensated damage to reputation, there must be some "convincing assurance that such a sacrifice is required under the First Amendment." *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

This Court's traditional application of *New York Times* standards provides ample protection for anyone who tries but fails to quote a speaker accurately, as described in Time Br. 11-21. *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968). If the speaker's statements are unusable as quotes, a writer may paraphrase and, as long as the paraphrase is accurate or a rational interpretation of ambiguous statements, will be protected. *Time, Inc. v. Pape*, 401 U.S. 279, 287-89 (1971). What the writer may not do is what respondents did here – attribute fabricated words to the speaker in direct quotation.

Unlike the rule proposed by respondents or the holding of the Ninth Circuit, petitioner asks this Court to elucidate a simple, "principled standard," *Hustler Magazine v. Falwell*, 488 U.S. 46, 55 (1988), which will give clear "content to these otherwise elusive constitutional standards." *Connaughton*, 109 S.Ct. at 2695. Writers faced with the constitutionally dangerous temptation to deliberately alter or fabricate a defamatory quote will know that liability may be imposed if they yield to the temptation. They will not have to speculate about whether the fabrication is consistent with the speaker's lifestyle or reflects the substance of the speaker's self-appraisal. (Pet. App. A at A-18).

Since no member of the media has yet to come forward with a plausible reason to encourage false quotes, the Court should protect the legitimate interests of public figures in their reputation and their right of free speech.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

CHARLES O. MORGAN, JR.
PAUL RICHARD KLEVEN

Counsel for Petitioner

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

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Petitioner,

vs.

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Respondents.

On *Writ Of Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

William Perry Pendley*
Gary N. Herbert
Todd S. Welch
Mountain States Legal Foundation
1660 Lincoln Street
Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

*Counsel of Record

Counsel for *Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* on behalf of its members.[1]

[1] *Amicus* has obtained the written consent of all parties. The written consent of all parties has been provided to the Clerk of the Court under separate cover.

INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundation's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues.

The impact of the instant decision upon MSLF members is particularly disturbing. Business leaders, elected officials and candidates for public office, as well as private citizens, all have learned to be careful and precise in their use of language when discussing controversial environmental issues which are volatile and evocative of media and public attention. MSLF is active on behalf of its members in crucial public discourse regarding issues of vital national importance – for example, the balancing of economic and environmental objectives in timber harvesting in the Pacific Northwest. It is this type of informed discourse which will be chilled if the instant decision is permitted to stand. Permitting this decision to stand will cause all Americans, including those represented by MSLF, to suffer the loss of vital freedoms.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. Since the action is one in tort, the questions for

Petitioner and Respondents are ones of liability and damages.

However, the interests of *amicus curiae* Mountain States Legal Foundation are those of the long term impacts of the decision below on public interest issues, including but not limited to the ability of public figures involved in controversial issues to be "quoted" correctly by the media, the willingness of public figures involved in controversial issues to engage in free and open discourse regarding those important public policy issues, and the ability of the media to retain the trust and confidence of the American public when reporting on important public policy issues.

In sum, at stake is the survival of the proper balancing of the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern. In achieving that balance, it is vital that consideration be given to the impact this decision will have on the free and open discussion of issues of public concern.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus adopts Petitioner's Statement of the Case. However, *amicus* supplements Petitioner's Statement of the Case with the following analysis of the decision by the Ninth Circuit Court of Appeals.

In its opinion, (App. A at A-10), the Ninth Circuit Court of Appeals summarized the "state of the current

law governing the defamatory nature of statements ostensibly ascribed to another person by the use of quotation marks." According to that summary:

> – "A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination." *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976).
>
> *BUT*: "An author may . . . under certain circumstances, fictionalize quotations 'to some extent.' " *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977).
>
> *HOWEVER*: "An author's privilege to alter quotations is not unlimited." *Bindrim v. Mitchell*, 92 Cal.App. 3d 61, 70, 155 Cal.Rptr. 29, 34, *cert. denied*, 444 U.S. 984 (1979).

Based on the interpretation of the Ninth Circuit Court of Appeals of the "state of the current law," the Court held that fabricated quotations are permissible when:

– they are " 'rational interpretations' of ambiguous remarks made by the public figure . . . ," *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452 (3rd Cir. 1987), or

– they do not " 'alter the substantive content' of unambiguous remarks actually made by the public figure." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

SUMMARY OF ARGUMENT

This is one of the most important and far-reaching cases to come out of the Ninth Circuit Court of Appeals in years. It is not only deeply disturbing for any who are required to deal with the press on a frequent basis – whether public interest lawyer, attorney in the private practice of law, public official, or businessman or businesswoman dealing with the controversial issues of the day. It is also devastating for the media.

Already the subject of much public skepticism, the press can ill afford yet another blow to its credibility or motives. This decision, if left standing, would administer such a blow: the public would conclude that since the courts permit journalists to make up "quotations" to satisfy the needs of their story, then all "quotations" are manufactured.

It seems so fundamental and beyond debate that quotation marks bracketing a group of words mean that those words, and no others, are the words of the individual being quoted. But, as Judge Kozinski points out in the very first paragraph of his dissent below, (App. A at A-32), that is exactly what this case is about. Do quotation marks mean that the words are those of the speaker?

Business leaders, politicians, and private citizens all have learned to be careful and precise in the words they use when discussing controversial issues. Over the past several years, business leaders and other public figures have schooled themselves on ensuring that their views are accurately conveyed to the public through the media. Business leaders and public figures have become so sensitized to the strong emotional baggage carried by some

words and phrases, that they eschew such words in their communications with the media.

If this decision is allowed to stand, such caution and precision is useless. A member of the media will be able to fabricate "quotations" that he or she believes are "rational interpretations of ambiguous remarks" or that "do not alter the substantive content of unambiguous remarks actually made." Under these circumstances it would be foolhardy for public figures to speak to the media.

Why should a reporter be free to make up a "quotation" when the language used by a public figure is ambiguous? In the event of such spoken ambiguity, isn't it the responsibility of the reporter to ask simply, "What did you mean by that?" and thereby seek to obtain a *real* quote?

For example, a public figure, speaking of the dangers to timbermen of the presence of "spikes" in trees – driven by those who seek to prevent timber harvesting – says: "The timberman who enters a spiked forest is walking the point in Viet Nam, never knowing when his chainsaw will hit a spike and seriously injure or kill him." Can a reporter, finding some ambiguity in that statement, quote the public figure as saying, "There is no difference between those who drive spikes in trees and the Viet Cong?" Under the decision below, the answer is "yes."

While different "quotations" may be the same substantively, isn't a public figure entitled, not only to the denotation of the words which he or she has chosen, but to the connotation as well? Thus the difference between

"his father and mother never married" and "he's a bastard" is somewhat startling to the reader – the latter carrying powerful, overwhelming emotions. However, both "mean" the same thing. While the burdens imposed upon reporters are quite limited under the First Amendment, don't those burdens include the requirement to "quote" only the exact words spoken? Under the decision below, the answer is "no."

Equally chilling is the breadth of fabricated quotations permitted by the holding of the Ninth Circuit Court of Appeals in the event of a public figure's "self-appraisal." (App. A at A-18). Under the decision below, a reporter who believes he or she has discerned the "substance of [a public figure's] self-appraisal" may attribute to that public figure – in the words of Judge Kozinski – "any other statement reflecting that same trait." (App. A. at A-39). Thus, care in the use of one's language is in vain if one happens to convey sufficient information to constitute a "self-appraisal" permitting the reporter to attribute to the public figure any quote consistent with that "self-appraisal." What public figure would be foolhardy enough to reveal any aspect of his or her character for fear that from that character assessment would spring a wealth of "quotes" that "reflect the substance of [that] self-appraisal?"

Must the public figure whose "self-appraisal" includes characterizing himself as "just a country lawyer" abide "quotations" which the reporter concludes a country lawyer might make? Must the public figure whose "self-appraisal" includes acknowledgement that she is "a coal miner's daughter" bear whatever "quotations" a reporter would conclude a country girl might make. Does

a "self-appraisal" by a public figure that he or she is "a devout Catholic," "a born-again Christian," "an orthodox Jew," "an ex football player," "a former Marine," "a feminist" open that public figure up to whatever stereotypical "quotations" a reporter would care to ascribe to the public figure? Under the decision below the answers are "yes."

Not only business leaders and other public figures involved in controversial public policy issues will suffer if this decision stands. The media and, in the end, the American public and its greatly revered and protected freedom of the press will also be adversely affected.

Which will go first – the willingness of public figures to talk to the media, or the willingness of the public to believe the media? The answer is uncertain. Yet, in the end, both will disappear. The public will quickly learn that the media is free to make up "quotations" and the public will increasingly distrust the media. Coincidentally, public figures will not talk to the media for fear of being the victims of fabricated "quotations." It is hard to imagine what could have a greater "chilling" effect on free speech by a public figure than the fear of fabricated "quotations."

Thus, the goal sought by our Founding Fathers, free and open discourse on issues of public concern, will be thwarted.

This Honorable Court should reverse the decision below not just because it is in conflict with decisions of this Honorable Court; not just because it is in conflict with the decisions of other Courts of Appeals; not just because it is in conflict with the relevant law in the State

of California; although each one of these provides a more than adequate basis for reversal. Rather, this Honorable Court should reverse the decision below because of the threat it represents to the preservation of the intent of the First Amendment and its goal of free and open discourse of vital public policy issues.

ARGUMENT

I. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By This Honorable Court.

A. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Seek To Achieve A Balance Between Protecting The Rights Of An Individual To His Good Name And The Free Flow Of Opinions And Ideas.

This Honorable Court has long struggled "to define the proper accommodation between the law of defamation and the freedom of speech and press protected by the First Amendment." *Gertz v. Welch*, 418 U.S. 323, 325 (1974). That struggle reflects this Honorable Court's efforts to balance "the individual's right to the protection of his own good name," *Id.*, at 341, with "the free flow of opinions and ideas [which lie] at the heart of the First Amendment," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), and is "essential to the common quest for truth." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984).

This decision from the Ninth Circuit Court of Appeals, in one fell swoop, demolishes nearly two hundred years of that balancing and destroys not only the

ability of an individual to protect his own good name, but the very purpose of the First Amendment. It is difficult to envision a more pernicious decision, or a decision which does more harm at one time, than does the instant decision of the Ninth Circuit Court of Appeals.

This Honorable Court should reverse the decision below in order to return the balancing of these two competing but not mutually exclusive goals.

B. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Assured To An Individual The Right To Protect His Good Name.

As was noted in *Rosenblatt v. Baer*, 383 U.S. 75:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendment. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Id., 92 (Mr. Justice Stewart concurring).

C. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Refused To Extend Constitutional Protection To A "Calculated," Or "Deliberate," Or "Reckless" Falsehood.

The decision of the Ninth Circuit Court of Appeals is directly contrary to the refusal of this Honorable Court to

sanction a "calculated falsehood," that is, "the lie, knowingly and deliberately published." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). This Honorable Court has consistently refused to extend the protection of the First Amendment to those "unscrupulous and skillful enough to use the deliberate or reckless falsehood." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2696, n. 34 (1989).

As the dissent below makes clear, (App. A at A-54 to A-55), the decisions of this Honorable Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971), provide no support for the exception which the Ninth Circuit Court of Appeals seeks to carve out and are, in fact, in direct conflict with the decision below. *Bose* and *Pape* stand for the proposition that malice may not be inferred from inaccurate language chosen to describe an event where the description is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " *Bose*, 466 U.S. at 512-13, quoting *Pape*, 401 U.S. at 290.

This Honorable Court, in *Bose*, sought to protect the essence of the First Amendment by recognizing the "descriptive challenges," *Bose*, 466 U.S. at 512, faced by the writer. However, no such "descriptive challenges" face a writer who, by the use of quotation marks, represents the words to be those of the speaker and not his or her own. While this Honorable Court, in *Pape*, permitted a news magazine to publish out-of-context quotations, nowhere in that decision is the use of fraudulent quotations condoned.

This Honorable Court has never afforded First Amendment protection to the writer of a "calculated falsehood." Since the decision of the Ninth Circuit Court of Appeals provides First Amendment protection for just such a "calculated falsehood," that decision is in direct conflict with the decisions of this Honorable Court. The decision below should be reversed.

D. The Decision Below Is In Conflict With The Decision Of This Honorable Court Which Leaves To The Factfinder A Determination Of Whether Actual Malice Exists In A Particular Case.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Honorable Court held that it was for the trier of fact to determine whether the publication was made without actual malice. However, "professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination. . . . " *St. Amant*, 390 U.S. at 732.

Nonetheless, the Ninth Circuit Court of Appeals held that Respondents were cloaked in the protective embrace of the First Amendment and hence immune from a determination of liability by the factfinder. This holding of the Ninth Circuit Court of Appeals is in direct conflict with the decisions of this Honorable Court. The decision below should be reversed.

E. The Decision Below Is In Conflict With The Decision Of This Honorable Court Setting Forth The Basis For Considering A Motion For Summary Judgment In A Libel Action.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Honorable Court held that, in considering a motion

for summary judgment in a libel action, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255. Yet in the case below, as Judge Kozinski made abundantly clear in his dissent, (App. A at A-44 to A-45), the Ninth Circuit Court of Appeals simply failed to believe the Petitioner.

II. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts Of Appeals.

A. The Decision Below Is In Conflict With The Decision Of Another Circuit Which Refused To Accord First Amendment Protection To Fabricated Quotations.

The Ninth Circuit Court of Appeals cites *Carson* for the proposition that a writer cannot "invent quotations and attribute them to actual persons." *Carson*, 529 F.2d at 213. Yet despite the court's recognition of the holding in *Carson*, and despite the analogous factual underpinnings of *Carson* with the instant case, the Ninth Circuit Court of Appeals choose to ignore not only its own general rule, but the rule from the Seventh Circuit which it cites as authority.

It is difficult, if not impossible, to ignore the holding of the Seventh Circuit in *Carson*, yet that is what the Ninth Circuit Court of Appeals has done. For in *Carson*, the Seventh Circuit denied First Amendment protection to fabricated quotations which the writer described as "a logical extension of what must have gone on," since, in the words of the Court, in the fabricating and imagining of such "facts" the author must have "entertained serious

doubts" as to their truth and "a high degree of awareness of their probable falsity." *Carson*, 529 F.2d at 213.

In the instant case, the writer did not simply entertain serious doubt as to the truth or possess a high degree of awareness of the probable falsity of the "quotations" which she fabricated. She knew for a fact that they were false since she was there with Petitioner and had a tape recording to verify whether or not he said the words which she attributed to him.

Instead of adhering to the rule of the Seventh Circuit, a rule which it endorsed, the Ninth Circuit Court of Appeals pursued an exception to the general rule. Yet there exists no such exception. The decisions of the Second and Third Circuit Courts of Appeals, which the Ninth Circuit Court of Appeals cites as its authority, certainly provide no basis for such an exception.

There is no exception whereby, in the words of the Ninth Circuit Court of Appeals – citing *Hotchner* – "[a]n author may . . . under certain circumstances, fictionalize quotations 'to some extent'." (App. A at A-10). *Hotchner* did not address the ability of a misquoted public figure to bring an action for defamation against the author who misquotes him. Instead, *Hotchner* involved an action by the person discussed in the quotation, and whether the defendant's republication of the original remark by Ernest Hemingway (albeit a kinder, gentler version of that remark) was libelous as it related to the individual discussed by Hemingway. *Hotchner* would only be in point if it addressed the ability of Hemingway's estate to

bring a defamation action, in his name, for the publisher's revisions of Hemingway's original remark. *Hotchner* offers the Ninth Circuit Court of Appeals no authority for concluding that a reporter may fabricate "quotations" and attribute them to the alleged speaker of the words.

The Ninth Circuit Court of Appeals set forth two "circumstances" where fictionalized quotations are permissible, but neither case cited as authority stands for that general proposition.

The Ninth Circuit Court of Appeals held that *Dunn* stands for the proposition that an author may fabricate quotations if those quotations are "rational interpretations" of ambiguous remarks of a public figure. (App. A at A-10 to A-11). However, that is not the holding of *Dunn*. *Dunn* relates solely to whether the speaker of words, in English, could maintain a cause of action against a newspaper which attempted to translate those words into their Spanish equivalent.[2]

Even if *Dunn* is not simply a translation case, it is inapposite. Even if *Dunn* stands for the proposition that a writer may fabricate quotations in an attempt to summarize – as maintained by the Ninth Circuit Court of Appeals – those are not the facts in the instant case. Respondents here did not represent that they were summarizing the remarks of Petitioner, but indicated that the quotations were the very words from his mouth.

As to the second exception offered by the Ninth Circuit Court of Appeals, permitted when the fabricated

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[2] That is, is it libelous to translate "litterbug" into the Spanish "cerdeo" meaning "pig." (App. A at A-50).

quotations "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure," (App. A at A-11), the cases cited, including *Hotchner*, are not supportive. As noted above, *Hotchner* does not address the factual situation of the instant case.

The decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Seventh Circuit Court of Appeals. The decision below should be reversed.

B. The Decision Of The Ninth Circuit Court Of Appeals Is In Direct And Intolerable Conflict With The Decisions Of Other Circuits On Other Points Of Law.

As noted above, the decision of the Ninth Circuit Court of Appeals is in conflict with the decision of this Honorable Court in *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986). The decision of the Ninth Circuit Court of Appeals is also in direct conflict with decisions of other circuits which have correctly applied the holding of *Anderson*, including *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987) and *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988).

The Ninth Circuit Court of Appeals improperly applied the clear and convincing evidence standard rather than the preponderance of the evidence standard, putting the Ninth Circuit Court of Appeals in conflict with the decision of *Goldwater v. Ginzburg*, 414 F.2d 329, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1099 (1970). The standard of proof question was left open by this Honorable Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2682 n. 2 (1989).

The Ninth Circuit Court of Appeals decision also puts it in direct and intolerable conflict with the District of Columbia Circuit since the latter circuit has repudiated the incremental harm doctrine. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) *rev'd on other grounds*, 477 U.S. 242 (1986).

III. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Another Decision Rendered By Courts Of The State Of California.

Since the instant case involves an action in tort for defamation, the law of the State of California is the relevant law for determining whether there exists a cause of action.

The Ninth Circuit Court of Appeals cites *Bindrim* for the proposition that "reckless disregard for the truth [is] apparent from [the defendant's] knowledge of the truth of what transpired . . . [since] the defendant . . . was in a position to know the truth or falsity of her own material. . . . " *Bindrim*, 92 Cal.App.3d at 73.

Despite the analogous factual underpinnings of *Bindrim* with the instant case, the Ninth Circuit Court of Appeals chose to ignore the holding of *Bindrim*. What could be more directly on point than the following conclusion of the court in *Bindrim*: "Since she attended sessions, there can be no suggestion that she did not know the true facts?" *Bindrim*, 92 Cal.App.3d at 73. (Quoted in App. A at A-6). To paraphrase, "Since [Ms. Malcolm] attended [interview] sessions [with Plaintiff], there can be no suggestion that she did not know the true [statements

made by him]." Thus the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the California court. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed. The insidious assault that this decision unwittingly permits against our most precious Constitutional freedoms – the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern – must be turned back.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
GARY N. HERBERT
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street
Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JEFFREY M. MASSON,
Petitioner,
v.
THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and JANET MALCOLM,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CERTAIN JOURNALISTS AND ACADEMICS IN SUPPORT OF PETITIONER

Of Counsel:
MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

STEWART ABERCROMBIE BAKER *
MALCOLM L. RUSSELL-EINHORN
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
* Counsel of Record for *Amici Curiae* Journalists and Academics

November 15, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, and to what extent, the First Amendment protects the publication of deliberately altered or manufactured quotations that are attributed to and defame a public figure.

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Rules

Supreme Court Rule 37 1

IN THE
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JEFFREY M. MASSON,
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v.
THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF CERTAIN JOURNALISTS AND ACADEMICS IN SUPPORT OF PETITIONER

A number of journalists and academics familiar with First Amendment jurisprudence respectfully submit this brief *amicus curiae* in support of Petitioner Jeffrey M. Masson. Counsel for *amici*, Steptoe & Johnson and the Center for Individual Rights,[1] have obtained the written consent of Petitioner and Respondents to file this brief. These written consents have been provided to the Clerk of the Court pursuant to Rule 37.

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[1] The Center for Individual Rights is a non-profit, public interest law firm that provides legal representation to deserving individuals and groups in cases raising significant legal policy issues. The Center is incorporated as a 501(c)(3) charitable organization under the Internal Revenue Code.

INTERESTS OF *AMICI CURIAE*

Identification of Amici Curiae

Amici consist of the following individuals:

Peter Collier is a free-lance writer and the co-author, with David Horowitz, of several widely acclaimed books, including biographies of the Rockefeller, Kennedy, and Ford families.

John De Mott is Professor of Journalism at Memphis State University. Before joining the Memphis State faculty in 1980, he taught journalism at Temple University, Northern Illinois University, Northwestern University's Medill School of Journalism, and the University of Kansas. Before becoming an educator, Dr. De Mott served 16 years as a news reporter and editor for the *Kansas City Star and Times.*

Mark Fackler, Ph.D., is Associate Professor of Communications at Wheaton College, Illinois and is the co-author of *Media Ethics: Cases and Moral Reasoning* (3d ed. 1991).

Joseph C. Goulden is the author of 16 non-fiction books. Prior to becoming a full-time writer, Mr. Goulden worked for newspapers for ten years, lastly as Washington bureau chief of *The Philadelphia Inquirer.* Mr. Goulden has received numerous newspaper and literary awards.

William E. Lee, Ph.D., is Professor at the Henry W. Grady School of Journalism and Mass Communication at the University of Georgia. Professor Lee has testified as an expert witness in many trials concerning journalistic practices and has written extensively on press freedom in journals such as *The Supreme Court Review.*

Clark Mollenhoff is Professor of Journalism and Law at Washington and Lee University. A Pulitzer Prize-winning Washington correspondent who has practiced journalism for over 40 years, he is the recipient of numerous First Amendment awards for distinguished report-

ing, including the John Peter Zenger award (U. Ariz., 1962), the William Allen White Memorial award (U. Kansas, 1964), and the National American Legion Fourth Estate award (1965).

Marvin Olasky, Ph.D., is Associate Professor of Journalism at the University of Texas, Austin. He has written several books about the media, including *Prodigal Press* and *Central Ideas in the Development of American Journalism.*

Robert Poole is the publisher of *Reason* magazine, a monthly journal of news and political opinion. Prior to becoming the editor of *Reason,* Mr. Poole worked for 12 years as its editor-in-chief. He is a former syndicated newspaper columnist.

Dwight L. Teeter, Jr., Ph.D., is Professor of Mass Communication at the University of Wisconsin-Milwaukee. A teacher of mass media law, history and writing for 25 years, Dr. Teeter worked for four years as a reporter for newspapers in Iowa and Wisconsin. He is a co-author of *The Law of Mass Communication* (6th ed. 1989).

Emmett Tyrrell, Jr., the author of several books on contemporary politics, is the editor-in-chief of *The American Spectator* magazine and a nationally syndicated columnist with King Features Syndicate.

Nature of Amici's Interest

Amici are seriously concerned about preserving media integrity in the wake of the Ninth Circuit's holding in this case. We believe that the decision below has far-reaching implications for journalists, public figures and the public at large. Permitting writers to deliberately alter or invent quotations is not essential to the operation of a free and effective press. Indeed, journalists who use quotation marks while substituting their voice for the speaker's undermine the public debate that the First Amendment was designed to protect.

The exceptional constitutional protection sought by Respondents makes for bad journalism and bad government. Our expression as journalists and writers depends on our credibility. If we cease to be trustworthy, we will forfeit our authority. We believe that this Court should continue to apply constitutional standards that separate fact from deliberate fiction.

SUMMARY OF ARGUMENT

The Ninth Circuit's novel First Amendment doctrine would allow publishers and writers to intentionally defame a public figure by attributing a false quotation to him, so long as the false quotation is a "rational interpretation" or does not "alter the substantive content" of remarks he actually made. This new standard will not advance First Amendment values. It will undermine them.

I. The marketplace of ideas depends on access to the wide range of views presented in the mass media. The press receives constitutional protection in part because it serves as a conduit for diverse views. But when the press deliberately misquotes public figures it corrupts the marketplace of ideas. By protecting deliberate misquotation, the court of appeals' doctrine will distort the very public debate that the First Amendment is designed to foster.

II. First Amendment interests in self-expression will also be subverted. When a reporter deliberately alters a quotation, he substitutes his voice for that of the speaker, inevitably changing the speaker's message and damaging the speaker's interest in expressing himself. What is more, taking such liberties with a public figure's speech diminishes his ability to tell his side of the story to the press. This strikes at the heart of *New York Times v. Sullivan* and its progeny, which assume that a public figure's access to the press to rebut defamatory falsehoods is an adequate substitute for a defamation suit.

III. A. The Ninth Circuit's test is also unworkable. Deciding which fictions constitute "rational interpretations" is a highly subjective inquiry. In the end, it will breed more jury trials, not fewer. And those trials will encourage precisely what this Court has sought to avoid —efforts to punish litigants for their unpopular views. The lower court's standard will encourage media defendants to attack the victim of their misquotation as having such controversial and unorthodox opinions that almost any words could be put in his mouth without liability.

III. B. Finally, the lower court's novel doctrine is unnecessary. The actual malice standard has adequately protected the press for a generation. Reporters are already shielded from liability for negligent or inadvertent misquotation, or for misquotation resulting from time pressures or other adversity. Protection also extends to the exercise of judgment involved in paraphrasing an ambiguous statement. The deliberate falsification of a quotation requires no such protection, since it harms, rather than helps, the quest for truth.

ARGUMENT

Freedom of speech and freedom of press are inextricably linked. Throughout this country's history, both freedoms have allowed individuals to express themselves freely. In modern society, the press has often served as the only means by which individuals could make their views heard. Without the mass media, their speech would have less value.

To ensure that the inhibiting effects of defamation suits do not silence these diverse voices, this Court has sought to strengthen First Amendment protection of the press. Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court has consistently endorsed a generous zone of security for allegedly libelous statements published about public figures. To prevail, a plaintiff must prove with "convincing clarity," *id.* at 286,

that the defendant published a defamatory falsehood with "actual malice"—that is, with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 280.

This constitutional shield offers considerable protection to the Respondents in this case. If the evidence establishes that Respondents misquoted Mr. Masson as a result of carelessness or negligence, no liability will attach. *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2696 (1989). If the evidence shows that they altered a particular quotation solely to render awkward grammar and pauses into readable English, their conduct will also withstand challenge. *Cf. St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968) (no liability where defendant lacks "serious doubts" as to truth of published statement). They will even prevail if Petitioner's evidence of malice ultimately lacks sufficient weight. *See Bose Corp. v. Consumers Union of America, Inc.*, 466 U.S. 485, 514 (1984); *New York Times*, 376 U.S. at 285-86 (record must establish actual malice with "convincing clarity").

Respondents want more. They want a special rule that would permit the press to deliberately alter or invent quotations so long as the false quotations constitute "rational interpretations of ambiguous remarks" or "do not 'alter the substantive content' of unambiguous remarks." (App. A at A-10-11) (citations omitted).[2] This rule would allow a writer to put his own words in a speaker's mouth as long as the false words are close enough to what the speaker actually said. Under this "close enough" standard, the reporter would be protected even if he deliberately falsified a quotation.

Respondents have invoked the First Amendment on behalf of their proposed new rule; it is fair to ask

[2] Citations designated "App. A at A——" refer to Appendix A filed in this Court by Petitioner with his Petition for Writ of Certiorari.

whether the rule will in fact foster the values embodied in the Amendment. Those values are most frequently identified as, *first*, society's interest in robust and uninhibited public debate, and *second*, individuals' interest in expressing themselves and their views. An examination of both interests suggests that they are better served by a rule encouraging accurate quotations than by a rule allowing the liberal use of false quotations.

I. UNINHIBITED, ROBUST PUBLIC DEBATE IS UNDERMINED BY A RIGHT TO DELIBERATELY ALTER OR INVENT QUOTATIONS

Democracy depends for its success upon citizens having free access to a broad range of ideas. Such access is "essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. at 503-04.

In today's world, access to the marketplace of ideas means access to the mass media. For, as this Court has recognized, "[i]nstead of acquiring information . . . by word of mouth . . . people now acquire it chiefly through the print and electronic media." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572-73 (1979). The press plays a unique role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978). In its everyday functions, a free press brings the public the words and ideas of thousands of different individuals.

The press therefore is protected under the First Amendment not only because it sets forth the views of publishers and writers, but also because it offers "the widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). When those of us who write for the press are sued for what we have written, we bring to court with us not just our own rights, but the First Amendment rights of all the other speakers who depend

on us to relay *their* views. This constitutional protection is necessary to keep open

> an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.

New York Times, 376 U.S. at 266 (citations omitted).

Those of us who are columnists and reporters set great store by our own views, but it would be the height of arrogance to claim that the handful of men and women who publish or write for the mass media can, by themselves, provide the wide range of views and voices on which democratic government hinges. Indeed, the press' greatest constitutional victory, *New York Times v. Sullivan*, protected a newspaper for publishing not its own but someone else's speech, in the form of paid political advertising.

When the press distorts the contest of ideas in the marketplace by publishing false statements of fact, this Court has held, it betrays public confidence and forfeits this right to special constitutional treatment; this is because "false statements of fact harm both the subject of the falsehood *and* the readers of the statement." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (emphasis in original). Such falsehoods do not foster the search for truth; rather, they "interfere with [this] truth seeking function. . . ." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). *See also Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) ("[T]he poisonous atmosphere of the easy lie can infect and degrade a whole society.") (Stewart, J., concurring).

If a deliberately false statement of fact has "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), falsified quotations lie even further beyond the pale. Publishers and reporters who deliberately invent or alter quotations are misrepresenting

the views of a man or woman whose right to speak is every bit the equal of theirs. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (press not entitled to greater First Amendment privileges than citizens generally). *Accord, Bellotti*, 435 U.S. at 782 n.18. The "close enough" standard—and the falsified quotations it will encourage—are likely to distort the very public debate the First Amendment is designed to protect.

II. A RIGHT TO DELIBERATELY ALTER OR INVENT QUOTATIONS INFRINGES UPON THE INTEREST OF PUBLIC FIGURES IN EXPRESSING THEMSELVES FREELY, IN WORDS OF THEIR OWN CHOOSING

The First Amendment also serves to protect each individual's interest in self-expression. To journalists, it is this aspect of the First Amendment that strikes the most personal chord. Journalists express themselves in even the most trivial or factbound police-blotter story. The words we choose, the facts we emphasize—all are part of our craft. Thus, Janet Malcolm has an interest in self-expression even when she writes nonfiction. But her interest, and that of the corporate Respondents, is no more or less weighty than Jeffrey Masson's own interest in expressing himself. *Cf. Saxbe v. Washington Post Co.*, 417 U.S. 843, 857 (1974) ("neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens") (Powell, J., dissenting). And that interest is entirely defeated if Jeffrey Masson's words can be replaced at will by Janet Malcolm's, because to change his words is inevitably to change his message. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

Nor is it necessary to extinguish Jeffrey Masson's self-expression in order to save Janet Malcolm's. She has

many ways to express herself. If she believes Jeffrey Masson is an intellectual gigolo, she can say so, and she will be fully protected by current law. She loses this protection only if she substitutes her words for Masson's while pretending to quote him. First Amendment values support a rule that preserves both Masson's and Malcolm's right to speak—using their own voices, not someone else's.

One further factor should be weighed in this balance. Masson is a public figure under *New York Times v. Sullivan*. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Because of this status, he receives less protection against libel and falsehood than would more private men and women. His protection is limited precisely because this Court assumes that a public figure has special access to the media and can more easily rebut defamatory falsehoods by conveying his or her own version of events to the public. *See Gertz v. Welch*, 418 U.S. at 344. By allowing Janet Malcolm and others to rewrite Masson's words when he tells his story, however, the lower court's doctrine puts at risk the unique self-help remedy that is the foundation of *New York Times v. Sullivan* and its progeny.

III. THE EXCEPTIONAL PROTECTION SOUGHT BY RESPONDENTS IS BOTH UNWORKABLE AND UNNECESSARY

Even if the lower court's rule were not so profoundly opposed to First Amendment values, it should be rejected. First, it requires an unworkable and subjective assessment. Second, it is unnecessary.

A. Respondents' Proposed Standard is Unworkable

The whole point of quotation marks is to indicate that the reporter has not engaged in interpretation. *See* M. Charnley & B. Charnley, *Reporting* 248 (4th ed. 1979) ("Quotation marks mean literally that the words they

enclose are exactly as the source gave them—verbatim.").[3] But the lower court's formulation permits journalists—and requires judges—to decide whether a false quotation is "close enough" to the speaker's actual words. This formula begs two questions.

The obvious difficulty is deciding how close is close enough. As Judge Kozinski pointed out below, the measurement can take place on a level of generality that permits wholesale fictionalization:

> What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.

(App. A at A-39).

Equally uncertain is which of the speaker's actual words may be used to justify a false quotation. Must the quote be a rational interpretation of things the speaker actually said in the interview? Or may the reporter rely on statements made in other interviews, at other times and in other cities, as the court of appeals seems to have decided below? If later interviews are grist for the mill, why not statements reported by other interviewers? And what will keep this from becoming a hall of mirrors, in which one reporter's fictions are invoked to justify another's?

No principled standard resolves these uncertainties. Deciding which interpretations are sufficiently "rational" and what evidence the reporter is entitled to invoke are matters of judgment, and inherently subjective judgment at that. Such a subjective analysis is especially inappro-

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[3] For the convenience of the Court, *amici* have lodged with the Clerk of the Court this source and a variety of other materials reflecting current standards of practice regarding quotation in the journalistic profession.

priate in a First Amendment case. *See Hustler Magazine v. Falwell*, 485 U.S. at 55 (1988) ("inherent subjectiveness" renders proposed "outrageousness" standard for actionable falsehoods defective).

Despite the lower court's insistence that this case need not go to a jury, the fact is that the vague standard accepted below could only be applied by a jury or other fact-finder. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (reaffirming role of jury in weighing evidence and drawing inferences in libel cases). But this Court has several times expressed concern that juries will not fairly find the facts in cases involving unpopular speakers or unorthodox ideas. *See, e.g., Gertz v. Welch*, 418 U.S. at 349-50; *New York Times*, 376 U.S. at 294-95 (Black, J., concurring). That danger is indeed posed by the lower court's test—though it is Jeffrey Masson, not Janet Malcolm, who would most likely be punished by a jury for holding unorthodox views.

The "close enough" doctrine would invite Janet Malcolm's lawyers to harp relentlessly (as indeed they already have) on all of Jeffrey Masson's most controversial and offensive statements. Everything he said in 40 hours of interviews would be combed and picked over and selectively presented—all in an effort to suggest that his views are so alien and peculiar that even Malcolm's most prejudicial misquotations are consistent with his character. Masson and his views would be at the center of the case, and the jury would be invited—openly or covertly—to punish him for them.

B. Respondents' Proposed Standard is Unnecessary

There is no need for courts and juries to enter this thicket. For a generation, the actual malice test has reconciled the competing interests of a free press and individual speakers in a variety of contexts. In that time, successful suits for falsifying quotations have been notable principally for their rarity. There are two reasons for this.

First, the press is already protected from liability for inadvertent or negligent misquotations by the requirement that a libel plaintiff prove reckless or knowing conduct by clear and convincing evidence. *See Harte-Hanks*, 109 S. Ct. at 2696. This standard ensures that unreliable sources, incomplete information, and time deadlines are taken into account in giving the press "breathing space" to print false statements. *See, e.g., Curtis Publishing v. Butts*, 380 U.S. at 158-59 (immediacy of dissemination factor in determining actual malice); *St. Amant v. Thompson*, 390 U.S. at 732 (recklessness may only be found where there are "obvious reasons to doubt veracity" of information on which false statements are based). Only conduct amounting to "purposeful avoidance of the truth," *Harte-Hanks*, 109 S. Ct. at 2698, falls outside the First Amendment's reach.

It will be the rare case indeed where a plaintiff can offer sufficient evidence to permit a finding that a defendant knew a quotation was false. Plaintiffs already face a considerable challenge in meeting this burden with "convincing clarity." *See Gertz v. Welch*, 418 U.S. at 342 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barier of the *New York Times* test.").

Second, and equally important, standard journalistic practice also protects reporters and publishers. Many reporters rely on video or audio tapes to verify the accuracy of the quotes they intend to print.[4] Others actu-

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[4] Whatever its value in a parade of horribles, there is no realistic possibility that journalists will be held liable for "cleaning up" quotes by removing the speaker's hesitations, stammerings or other syntactical lapses. This is, in fact, not as common a practice among reputable journalists as one might suppose. Many of us have learned to clean up with ellipses and brackets, tools that tell the reader that an editor has been at work. Even if that were not true, it is hard to imagine the public figure who would sue a reporter for improving his grammar—and harder still to imagine the jury that would find damages in such a suit. Reporters are at risk only if

ally call the subject to verify quotations (and, unlike the *New Yorker* in this case, pay attention when the source denies the quote).

Where these practices do not suffice, the writer still need not choose between silence and a lawsuit. Any professional reporter worthy of the name knows how to convey the gist of what he heard without resorting to fictional quotations—either by limiting quotation to verifiable phrases or by paraphrasing what was said. *See, e.g.*, J. Highton, *Reporter* 50 (1978) ("Don't fake quotes. If you do not catch a full quote, put quote marks around only the words you do catch"); J. Olen, *Ethics in Journalism* 100-01 (1988) ("If the speaker's actual words are completely unusable . . . the reporter can always resort to indirect quotation or a combination of indirect and direct, putting quotation marks around only usable phrases.").

By choosing to paraphrase—by making clear to the reader that some interpretation has occurred—the reporter gains the advantage of broad First Amendment protection. This Court created breathing space for the difficult choices that must be made when paraphrasing ambiguous statements in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). But the *Pape* Court provided protection precisely because "departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." *Id.* at 286. Implicit in the *Pape* Court's holding is the view that "full direct quotation" ought not to require similarly difficult choices—or corresponding constitutional protection.[5]

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their "clean-up" actually distorts the speaker's meaning in a damaging way, and even then the distortion must reflect actual malice.

[5] It is therefore completely misleading to imply, as did the Ninth Circuit, that a journalist faces descriptive challenges in transmitting a speaker's words through direct quotation, *see Bose v. Consumers Union*, 466 U.S. at 512, and that those words invariably "'bristl[e] with ambiguities'" (App. A at A-11) (*quoting id.* (*quoting Pape*, 401 U.S. at 290)). As the dissent below pointed out, although a person's *meaning* may be ambiguous, there is usually no ambiguity about the *words* he or she uttered (App. A at A-54).

The existing constitutional protection for paraphrasing means that the lower court's rule will not affect the content of news stories, only the manner in which they are presented. No doubt, some reporters would rather make up quotes than engage in paraphrasing. Quotations are more vivid, more forceful—but only because the audience believes that it is hearing from the speaker directly, without an intermediary. When that assurance is gone, quotations will quickly lose their power. Janet Malcolm and others like her should not be free to hijack this powerful form of expression and drain it of its power in a way that will ultimately deprive all journalists of a valuable tool of the trade.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

Of Counsel:
MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

STEWART ABERCROMBIE BAKER *
MALCOLM L. RUSSELL-EINHORN
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
* Counsel of Record for *Amici Curiae* Journalists and Academics

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF HOME BOX OFFICE, INC., BUENA VISTA PICTURES DISTRIBUTION, INC., COLUMBIA PICTURES ENTERTAINMENT, INC., ORION PICTURES CORPORATION, PARAMOUNT PICTURES CORPORATION, AND TWENTIETH CENTURY FOX FILM CORPORATION IN SUPPORT OF RESPONDENTS

Of Counsel:
JOHN S. REDPATH, JR.
SHARI L. PATRICK
Home Box Office, Inc.
1100 Avenue of the Americas
New York, N.Y. 10036
Attorneys for
Home Box Office, Inc.

(Additional Of Counsel
listed inside cover)

P. CAMERON DEVORE *
DANIEL M. WAGGONER
BRUCE E. H. JOHNSON
R. BRUCE EASTER, JR.
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

ROBERT D. CUNNINGHAM
Buena Vista Pictures
Distribution, Inc.
2900 W. Alameda Ave.
Burbank, Ca. 91521
Attorney for Buena Vista
Pictures Distribution, Inc.

RONALD E. GUTTMAN
Columbia Pictures Entertainment, Inc.
3400 Riverside Dr.
Burbank, Ca. 91505
Attorney for Columbia Pictures
Entertainment, Inc.

BRENDAN P. BOYAIRD
Orion Pictures Corporation
1325 Avenue of the Americas
New York, N.Y. 10036
Attorney for Orion Pictures
Corporation

DAVID Y. HANSELMAN
Twentieth Century Fox Film Corporation
10201 West Pico Blvd.
Los Angeles, Ca. 90213
Attorney for Twentieth Century Fox
Film Corporation

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST

This Brief [1] is submitted on behalf of Home Box Office, Inc. (referred to as "HBO"), and Buena Vista Pictures Distribution, Inc., Columbia Pictures Entertainment, Inc., Orion Pictures Corporation, Paramount Pictures Corporation, and Twentieth Century Fox Film Corporation (collectively referred to as the "Motion Picture Amici").

HBO provides television programming to subscribing viewers throughout the United States. HBO telecasts motion pictures over two pay television services (HBO and Cinemax) and exhibits many works produced by the Motion Picture Amici, as well as dramatic programs produced by or specifically for HBO.[2] The Motion Picture Amici produce, or finance production of, motion pictures which they distribute for exhibition throughout the world.[3] In addition, some of the Motion Picture Amici produce or finance production of movies and dramatic programs created solely for television.

This case is of enormous significance to the Amici. Scores of movies over the years, many produced and distributed by the Motion Picture Amici and HBO or telecast by HBO, have blended fact and fiction. These movies and programs, often referred to as docudramas, are based on current or recent events of public interest and include portrayals of both famous and infamous people.[4]

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Rule 37.3.

[2] In this Brief, HBO and the Motion Picture Amici will generally be referred to as Amici.

[3] The only exception to this is Buena Vista Pictures Distribution, Inc., which does not produce or finance production of motion pictures, but distributes the motion pictures of other producers, including Walt Disney Pictures and Television, Touchstone Pictures, and Hollywood Pictures.

[4] Many of the motion pictures and dramatic television programs that fall within this genre and were produced by Amici are iden-

Invented quotations are essential to docudramas. In dramatic exposition, conversations cannot be reconstructed with stenographic accuracy and authors of docudramas must create conversations for the real people portrayed. Actual conversations often are compressed to fit within the limited time-frame of a movie or to produce greater artistic impact without the intrusion of a narrator.

The strong interest of Amici arises from petitioner's request for a broad rule requiring verbatim quotation at the peril of defamation actions. A verbatim quotation rule would strike at the core of the docudrama genre; the very nature of docudramas requires literary license to invent dialogue. This Court should reject petitioner's invitation to expand defamation law outside the scope required to protect any legitimate State interest and affirm the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Libel law historically has been concerned with loss to reputation, not the presence of inaccurate quotations as an allegedly independent harm. Following this tradition, the Court of Appeals carefully applied existing defamation law and concluded that, where the substance conveyed by the alleged misquotation was accurate, the mere allegation of alteration or fabrication of the plaintiff's words did not in itself create an actionable defamation claim.

Petitioner now urges this Court to promulgate a broad rule requiring verbatim quotation. Petitioner offers a talisman—the apparent misuse of quotation marks—to prove *both* defamatory falsehood and actual malice. Under this theory, courts no longer would address the central interest in redressing harm to reputation. Rather, they would substitute a mechanical test in place of search-

tified below. Numerous motion pictures and dramatic programs that were produced by entities other than Amici are also discussed below.

ing review of evidence proffered to meet the constitutional burden of proving falsity and actual malice.[5]

Amici believe that petitioner's proposed rule would reach far beyond the facts of this case, add more confusion to litigation concerning docudramas, and substantially narrow the scope of creativity and expression protected by the First Amendment.[6] The rule could strip many publications of First Amendment protection, yet it is not designed to promote the States' legitimate interest in preserving individual reputation.

For these reasons, and the reasons set forth below, the Amici respectfully request that the decision of the Court of Appeals be affirmed.

ARGUMENT

I. THE AMICI PRODUCE AND DISTRIBUTE MANY WORKS WITH INVENTED DIALOGUES AND SCENES.

A. Docudramas Express Ideas and Educate the Public.

Nearly forty years ago, this Court recognized that movies are a vital creative and educational medium.

> They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. . . . [T]hey are designed to entertain as well as to inform.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[5] *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

[6] Petitioner claims that he does not seek to impose the rule on docudramas or works where the reader "knows" quotations are not verbatim. But this position presumes that such "knowledge" is always self-evident on the face of a work or that a disclaimer that a work is "fictionalized" will automatically protect speech. The troubled history of defamation litigation against works drawing on real people and events to portray greater truths demonstrates that even a warning of fictionalization will not insulate the creative and expressive process from attacks under state defamation law.

Motion pictures cover a broad range of subjects. In some, history serves as a backdrop for fictional characters. Others, in the manner of a *roman à clef*, are disguised renderings of real people and events. *See Time, Inc. v. Hill*, 385 U.S. 374, 376-78 (1967).[7] Still others recreate—without disguise—real and frequently still-living subjects, in the form of docudrama. *See, e.g., Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y. 1987).[8]

Docudramas serve a different purpose than documentaries. "A documentary is a non-fictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact." *Id.* at 658. At the opposite extreme from documentaries, completely fictional and imaginary works have no foundation in actual events or real people's lives.[9]

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[7] One well-known example is Orson Welles' *Citizen Kane*, based on the life of William Randolph Hearst. Though "primarily a study of the private life of a public figure, it is political in its obsession with power." T. Christensen, *Reel Politics* 59 (1987); *see also* Note, *Welcome to the Nineties Bindrim v. Mitchell: Now Drop Dead*, 12 Hastings Comm./Ent. L.J. 517, 522-23 (1990) (discussing the parallels between Hearst and the fictional Kane).

[8] Film scholars disagree on an exact definition of docudrama. One study categorized "nine variations of docudrama 'ranging from the "pure" form based on investigatory and trial records recreating events in the lives of actual persons . . . to programs utilizing historical personages or themes which include some fictionalization.'" Feldman, *Footnote to Fact: The Docudrama*, in *Film Genre Reader* 346 (B. Grant ed. 1986) (quoting Hoffer & Nelson, *Docudrama on American Television*, in 30 *Journal of the University Film Association* no. 2 (Spring 1978)). For purposes of this Brief, Amici refer primarily to docudramas that recreate actual events in the lives of real persons. But, as is illustrated in the cases discussed below, the broad sweep of a verbatim quotation rule could reach well beyond "pure" docudramas and impact even purely fictional films.

[9] Law also utilizes fiction to serve its purposes. "A fiction in the law is indeed a fiction. It is something made up. If there is correspondence to the facts, that is coincidence. The fiction may, of course, be true in a nonliteral sense." C. Rembar, *The Law of the Land* 208 (1980). Fictions "are to be praised when skillfully used." J. Gray, *The Nature and Sources of the Law* 37 (1931).

Positioned between fictional movies and factual documentaries, docudramas blend fact and fiction in an attempt to capture essential truths about persons and events without verbatim recreation. Actors and actresses portray people who are the subject of the movie, speak fictionalized dialogue, and the director or screenwriter may telescope multiple events or create composite characters for dramatic effect. "Self-evidently a docudrama partakes of author's license—it is a creative interpretation of reality." *Id.* at 658.[10] Creative interpretation through docudrama would be impossible if deviation from verbatim quotation were itself an independent basis for assessing defamation liability.

B. A Wide Range of Award-Winning Docudramas Tell the Underlying Truth Without Duplicating Actual Events.

Numerous movies, many of which were produced or distributed by Amici or telecast by HBO, and many of which have won the highest awards in the industry, portray living public figures and address issues of political

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[10] Petitioner suggests that he has no intention of implicating "docudramas, memoirs, reviews or other publications where the reader is told the quotes are not verbatim." Brief for Petitioner at 26. But given petitioner's criticism of "extending constitutional protection to deliberately altered and manufactured quotations," *id.* at 22, and his approving analysis, *id.* at 23, 24 of *Bindrim v. California*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved in McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 847 n.9, 727 P. 2d 711, 719 n.9, 231 Cal. Rptr. 518, 525 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987), a case involving a defamation action brought against a work of fiction, this suggestion is disingenuous. Indeed, the amicus brief of The Mountain States Legal Foundation in support of petitioner asserts that there "is no exception" allowed for fictionalizing quotations, unless, perhaps, the speaker is deceased. *See* Amicus Brief of The Mountain States Legal Foundation at 14-15.

and social importance without exact replication of history. A few examples of the many listed below illustrate the kind of docudramas that could be at risk under a per se misquotation rule.

All the President's Men[11] tells the Watergate story from the viewpoint of reporters for The Washington Post.[12] *The Right Stuff*[13] recreates the early days of NASA with its failures and successes, with actors portraying, among others, astronaut John Glenn, now a United States Senator, and the late President Lyndon B. Johnson. *The Killing Fields* is based on the escape from Cambodia and the Khmer Rouge regime by Dith Pran, the Cambodian assistant to The New York Times' war correspondent Sydney Schanberg. Each of these docudramas recreates actual events in the lives of real people, with actors and actresses portraying real, and often still living people, and these portrayals employ invented dialogue that seeks not mindless duplication, but rather the essence of character and life.[14] Many of HBO's

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[11] Based on the book by Carl Bernstein and Robert Woodward and telecast by HBO. Screenwriter William Goldman won an Academy Award for his script.

[12] Many believe that this movie had significant political repercussions. For example, the film's screenwriter, William Goldman has asserted that by resurrecting the Watergate issues during the 1976 presidential election year, this movie helped elect Jimmy Carter to the presidency. *See* T. Christensen, *supra* n.7, at 136.

[13] Based on the book by Tom Wolfe and telecast by HBO.

[14] Scores of other docudramas telecast by HBO also dramatically recreate stories of real people and events, both current and historic. These include *Silkwood*, the story of Karen Silkwood, her work in a nuclear facility, and her mysterious death while driving to meet a news reporter to discuss the facility; *A Cry in the Dark*, a recreation of the events surrounding and the trial of Lindy Chamberlin based on the disappearance of her baby; *Scandal*, which retells the story of the indiscretions of Britain's Secretary of State for War John Profumo with Christine Keeler and his resulting expulsion from government; and *My Left Foot*, which portrays Christy Brown, who overcame severe physical disabilities from cerebral palsy to become a painter. These movies may inspire,

award-winning dramatic programs are also docudramas that draw from current or recent events.[15]

All of these works serve at least the functions of education and entertainment.[16] But they cannot tell their story without the liberty to imagine dialogue and create conversations for real people.[17]

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educate, inform, and entertain, even though they do not exactly mimic factual events; and particularly because each movie characterizes living persons, each would be threatened by petitioner's proposed rule.

[15] HBO's *Mandela* traces Nelson Mandela's struggle through the African National Congress, his trial for high treason, and imprisonment after 1962. In *Conspiracy: The Trial of the Chicago 8*, HBO recreated the trial of the alleged participants in the riots that accompanied the 1968 Democratic Convention. *Murderers Among Us: The Simon Wiesenthal Story* won Ace Awards for Best Movie and Best Director. HBO's *Tailspin: Behind the Korean Airliner-Tragedy* reconstructs the shooting down of KAL 007 and the behind-the-scenes drama of reactions of various United States governmental departments. In a biographical vein, HBO's *Murrow* chronicles the legendary newscaster, Edward R. Murrow.

[16] Some docudramas are closer in format and informational content to news programs, dramatizing stories as they happened at the time. Others are closer to "pure" fiction, recreating significant events using only a historical backdrop and a more extensive use of literary license. *See* Feldman, *supra* n.8, at 346. Yet each format seeks to capture some essence of the human condition and each is equally threatened by litigation if petitioner's argument is adopted.

[17] As a practical matter, producers sometimes may secure liability releases from some of the individuals who will be portrayed in a docudrama. Sometimes, however, such individuals cannot be located years after the event—until they suddenly surface as libel plaintiffs. In *Judge Horton and the Scottsboro Boys* (1976), NBC recreated the story of the prosecution of nine black men for an alleged rape, which resulted in several significant decisions by this Court: *Powell v. Alabama*, 287 U.S. 45 (1932), *Norris v. Alabama*, 294 U.S. 587 (1935), and *Patterson v. Alabama*, 294 U.S. 600 (1935). NBC concluded that the complainant was no longer alive. After the first broadcast, she sued for defamation and invasion of privacy. *See Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981). Releases present

C. Docudramas Spring From a Long Literary and Theatrical Tradition and Portray a Wide Variety of People and Issues.

Inventing dialogue and events, of course, is not a creation of the twentieth century, but extends back at least to Plato. *The Apology* purports to portray Socrates' unsuccessful defense argument at his trial—"not, of course, a stenographic report, but what remained in Plato's memory some years after the event, put together and elaborated with literary art." B. Russell, *A History of Western Philosophy* 84 (1945). Indeed, Plato's most important dialogues in *The Republic* claimed Socrates as the protagonist, yet the dialogues were not verbatim, if indeed any of *The Republic* actually quoted Socrates. *See id.*[18]

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other problems. For example, the producer may not know who, among many prospective characters, fictional and semi-fictional, will require or demand a release. Furthermore, the person from whom the release is sought may decide to extract changes in the script to promote personal whims or ideology or may simply refuse to sign at any price. More importantly for this appeal, the possibility of paying money and obtaining a release does not answer the major First Amendment questions presented by petitioner's proposed rule.

[18] Thucydides created quotations of his contemporaries even though he could have recorded the words of many of the speakers. "[M]y method has been, while keeping as closely as possible *to the general sense of the words that were actually used*, to make the speakers say what, in my opinion, was called for by each situation." Thucydides, *The Peloponnesian War* 24 (R. Warner trans. 1954) (emphasis added).

Modern investigative reporters have done the same. Nicholas Gage, a former reporter for The New York Times who researched and wrote of his mother's execution by Greek communists in 1948, quoted Thucydides when he observed that in his book he "' put into the mouth of each speaker the sentiments proper to the occasion, expressed as I thought he would be likely to express then.'" N. Gage, *Eleni* 471 (1983). The book was later made into a movie, *Eleni* (1985), which recreated Gage's efforts at researching the story, and depicted his mother and the people and events surrounding her execution.

History as portrayed through drama was one of Shakespeare's favorite formats,[19] and his English Histories alone comprise over a quarter of the Bard's canon. The *Henry VI* plays were written and first performed in 1598 and " 'there is no certain evidence that any popular dramatist before Shakespeare wrote a play based on English history.' . . . If he did not originate the form of the History Play, when he wrote the Henry VI plays, he created its vogue and shaped its tradition." R. Ornstein, *A Kingdom for a Stage* 6 (1972) (quoting F. Wilson, *Marlowe and the Early Shakespeare* 106 (1952)). The characters in Shakespeare's Histories spoke with invented quotations, but captured the essence of historical events with a beauty and clarity rarely found in life.[20]

Not surprisingly, fictional histories have played a substantial role in American literature. Many of these histories relied on invented (or dubiously reconstructed) dialogue. Indeed, Parson Weems' tale in his "biography" of George Washington established one of the Nation's most enduring myths—young George chops down a cherry tree and then admits his guilt, "I can't tell a lie, Pa." *See* M. Weems, *Life of Washington*, xxii-xxiii (M. Cunliffe ed. 1962). Although this story may be discredited as a fictional tale, *id.*,[21] not a factual account,[22] it

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[19] "Shakespeare knew that tradition supplies a better fable than any invention can." R. Emerson, *Shakespeare; Or The Poet*, in *Essays and Lectures* 713 (1983).

[20] One guesses that Henry V spoke more humbly and less coherently at Harfleur than when Shakespeare had him say "Once more unto the breach, dear friends, once more; Or close the wall up with our English dead." *Henry V*, Act III, sc. i.

[21] "At last, after a century and a quarter, the rubbish has been mostly cleared away, and only those who willfully prefer to deceive themselves need waste time over an imaginary Father of His Country amusing himself with a fictitious cherry tree and a hatchet." *Id.* (quoting Thayer, *George Washington* vii (1922)).

[22] Young Washington's "quote" may be among this nation's most famous fictionalized quotations, but its underlying "truth" highlights a critical question for defamation cases. This Court has fre-

remains true in a larger sense as a portrayal of Washington's character.

Other early American examples of docudramas with invented or fabricated quotations include Henry Wadsworth Longfellow's *Paul Revere's Ride* and Washington Irving's *Knickerbocker's History of New York.*[23] In the latter, which was first published in 1809, Irving used his satiric "history" to attack contemporary American politicians. "The symbol of Irving's America and focal point of his displeasure . . . is Thomas Jefferson's administration of 1801 to 1809. Early republicans had little trouble in recognizing their third president in the figure of William the Testy." R. Ferguson, *Law and Letters in American Culture* 157 (1984) (footnote omitted).[24]

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quently observed that "'there is no constitutional value in false statements of fact.'" *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). And the substance of petitioner's appeal is that inaccurate quotation should be deemed automatically a false statement of fact. Yet, Parson Weems' tale of young Washington, though literally "false" in one sense, has helped shape national aspirations and conceptions of leadership, and has provided a strong moral example for youth. Here, one must ask whether the facts or the myth more truly portray the essence of George Washington's integrity and whether the facts or myth are more or less deserving of constitutional protection.

[23] Irving later poked fun at his fictionalizing in the work:

> [N]either did I conceive I was committing any grievous historical sin in helping out the few facts I could collect in this remote and forgotten region with figments of my own brain, or in giving characteristic attributes to the few names connected with it which I might dig up from oblivion.

W. Irving, *Knickerbocker's History of New York*, Author's Apology at 2 (New York Century Co. ed. 1910).

[24] Although identifiable, the depiction also was inexact. According to Jefferson's biographer Dumas Malone, William was small, impatient, and had violent outbursts of temper. "Jefferson did not look like that and [was not] passionate and unreasonable. . . . Nevertheless, along with some wide misses, the young author also made some palpable hits." D. Malone, *Jefferson and His Time, The Sage of Monticello* 26 (1981).

Producers of motion pictures naturally adopted the literary and theatrical devices of invention, drama, and imagined dialogue of historical or living people. Motion picture docudramas thus have covered a wide range of American life, and dramatize and explain significant public events, politicians, and public figures.[25] Even the events surrounding and the repercussions of decisions of this Court have been dramatized.[26] Cases in other courts have inspired powerful docudramas that recreate the events and important trials of numerous people [27] on a vari-

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[25] Given the sheer volume of movies that have been produced over the years, the docudramas in this Brief are a representative sample, not a comprehensive listing.

[26] *Gideon's Trumpet* (1980), starring Henry Fonda as Clarence Gideon and Jose Ferrer as Abe Fortas (prior to his appointment to the Supreme Court) dramatized Florida's prosecution of Gideon, which led to this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The events and people of *Roe v. Wade*, 410 U.S. 113 (1973), were recently dramatized in a television docudrama called *Roe v. Wade* (1989) and telecast on the NBC television network. A new docudrama called *Separate But Equal*, tells the story of *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955). Sidney Poitier portrays the NAACP attorney, now Supreme Court Justice, Thurgood Marshall and the film will be telecast in the near future on the ABC television network. The lives of great jurists have also been portrayed in docudramas such as *The Magnificent Yankee* (1950) based on the life of Oliver Wendell Holmes.

[27] *I Want to Live!* (1958) raised questions about capital punishment by recreating the events surrounding a homicide, and the prosecution and execution on June 3, 1955 of a 32-year-old woman named Barbara Graham for the crime. T. Harris, *Courtroom's Finest Hour In American Cinema* Introduction at xii and 38-39 (1987). *Inherit the Wind* (1960) recreated the Scopes trial with Spencer Tracy portraying Clarence Darrow and Gene Kelly portraying a cynical reporter modeled on H.L. Mencken. T. Harris, *supra*, Introduction at xii and 110-14. *Judgment at Nuremberg* (1961) telescoped the historical Nuremberg war crimes trials of twenty-two defendants into a quartet of four defendants. T. Harris, *supra*, Introduction at xii and 129-31.

ety of issues. Political events,[28] as well as political leaders and their careers,[29] and military leaders[30] and campaigns,[31] all have been captured in docudramas. Nor

[28] As noted, *All The President's Men* (1976) recreates the Watergate story. *Missing* (1982), which won an Academy Award for best screenplay, tells of American Charles Horman's disappearance and murder in Chile during the coup that overthrew the Allende government. *Mississippi Burning* (1988) dramatizes the FBI investigation of the murders of three civil rights workers in Mississippi in 1964. *Blood Feud* (1983) chronicles Teamster Union leader Jimmy Hoffa's lengthy battles with Robert Kennedy. *Born on The Fourth of July* (1989) recreates the events at war and the return home of Vietnam veteran Ron Kovic. *Collision Course* (1975), a television docudrama, reconstructs the events surrounding General MacArthur and President Truman's clash over ending the Korean War. *Cry Freedom* (1987) is a film of South African Steven Biko's struggle against apartheid in South Africa. *Tail Gunner Joe* (1977) is a television movie chronicling the life and career of Senator Joseph McCarthy. *See generally Cohn v. National Broadcasting Co.*, 3 Med. L. Rptr. 1999 (N.Y. Sup. Ct. 1978), *modified*, 67 App. Div. 2d 140, 414 N.Y.S.2d 906 (1979), *aff'd*, 50 N.Y. 2d 885, 430 N.Y.S.2d 265, 408 N.E.2d 672, *cert. denied*, 449 U.S. 1022 (1980), which involved a defamation and invasion of privacy action brought by the late Roy Cohn.

[29] *All The King's Men* (1949) (Huey Long); *Eleanor and Franklin* (1976 and 1977); *Blaze* (1989) (Louisiana Governor Earl Long); *Che!* (1969) (Che Guevara); *Wilson* (1944) (Woodrow Wilson); *Mussolini: The Decline and Fall of Il Duce* (1985); *Give 'em Hell Harry* (1975) (Harry Truman); *Gandhi* (1982); *LBJ: The Early Years* (1987).

[30] *Patton* (1970); *MacArthur* (1977); *Lawrence of Arabia* (1962) (T.E. Lawrence); *PT-109* (1963) (John F. Kennedy); *The Desert Fox* (1951) (Field Marshall Rommel); *The Desert Rats* (1953) (Field Marshall Rommel).

[31] *The Longest Day* (1962) retells the story of D-Day, the Allied invasion of Normandy. *The Bridge On The River Kwai* (1957) won several Academy Awards, including best screenplay for this true story of British prisoners of war in a Japanese prison camp. *Tora! Tora! Tora!* (1970) chronicles the Japanese attack on Pearl Harbor from both the American and Japanese viewpoints. *Fat Man and Little Boy* (1989) tells about Robert Oppenheimer and General Groves and the development of the atomic bomb during World War II. *The Great Escape* (1963) recreates the story of an attempted escape of allied prisoners of war from a German prison camp during World War II.

have sports figures,[32] entertainers,[33] or people who helped shape our understanding of the world in more humble ways, been less frequent subjects.[34]

[32] *Chariots of Fire* (1981) (on the 1924 Olympic athletes Eric Liddell and Harold Abrahams and winner of Academy Awards for Best Screenplay and Best Picture); *Raging Bull* (1980) (prize fighter Jake LaMotta); *The Jesse Owens Story* (1984); *The Babe Ruth Story* (1948); *Babe* (1975) (Babe Dedrickson Zaharias); *Heart Like A Wheel* (1983) (race car driver Shirley Muldowney); *The Bob Mathias Story* (1954); *Brian's Song* (1970) (portraying Brian Piccolo and Gayle Sayres of the Chicago Bears); *Knute Rockne, All American* (1940) (in which Ronald Reagan portrays football star George Gipp under the tutelage of Notre Dame's legendary coach).

[33] *Coal Miner's Daughter* (1980) (Loretta Lynn); *Lenny* (1974) (Lenny Bruce); *Sweet Dreams* (1985) (Patsy Cline); *La Bamba* (1987) (Ritchie Valens); *The Benny Goodman Story* (1955); *Louis Armstrong—Chicago Style* (1976); *The Buddy Holly Story* (1978); *Great Balls of Fire* (1989) (Jerry Lee Lewis); *Bound For Glory* (1976) (Woody Guthrie).

[34] *White Hunter, Black Heart* (1990) is a drama based on film director John Huston. *Reversal of Fortune* (1990) portrays the lives of Claus and Sonny Von Bulow and Claus Von Bulow's trial for attempted murder. *Stand and Deliver* (1987) tells the story of Jaime Escalante who teaches mathematics and calculus to inner city students in Los Angeles. *The Ryan White Story* (1989) tells of a young hemophiliac who contracts AIDS. *Norma Rae* (1979) dramatizes the story of Crystal Lee Sutton, a labor organizer in the Southern textile industry. *Joe Hill* (1971) portrays labor leader Joe Hill. *Matewan* (1987) portrays the miners involved in a coal miner's strike in West Virginia. *Dog Day Afternoon* (1975) won an Academy Award for Best Screenplay for dramatizing the story of a Brooklyn man who robbed a bank to pay for his lover's sex change operation. *Midnight Express* (1978) also won an Academy Award for Best Screenplay for this story of American Billy Hayes' imprisonment in a Turkish prison for drug smuggling. *Birdman of Alcatraz* (1962) portrays Robert Stroud, a convict who became an ornithology expert while in prison. *The Spirit of St. Louis* (1957) recreates Lindberg's 1927 trans-Atlantic flight.

Some people are of such great interest that their story has been dramatized more than once. Helen Keller's life-story was

Docudramas that dramatize real people, events, and by necessity their conversations, have become a prominent art form in American culture with deep roots in the American literary and film tradition.[35] Without their varied, and often successful, attempts to capture the essence of events and people by metaphor, our cultural heritage would be far poorer and the search for truth protected by the First Amendment far less rich.

II. PETITIONER'S "RULE" WOULD FURTHER CLOUD THE ALREADY MURKY WATERS OF LITIGATION OVER DOCUDRAMAS AND OTHER FICTIONAL WORKS.

Docudramas, like many other creative works, are neither pure fact nor pure fiction. To the literal-minded, however, "fictionalization" equals falsity, and docudramas have become inviting targets for defamation plaintiffs and their lawyers. Courts thus have confronted the conundrum of applying defamation law (which has as its purpose the punishment of those who utter defamatory

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dramatized in two movies, one made in 1962 and the other in 1979, both called *The Miracle Worker*. The story recounted in Anne Frank's diary also has been filmed twice, once in 1959 and once in 1980. Both were called *The Diary of Anne Frank*.

[35] The docudrama format is by no means limited to films and books. Numerous theatrical plays also fall within the genre. Some of these are: *A Walk in the Woods* (a dramatization of arms negotiators Paul Nitze and Yuli Kyitsinsky's agreement on arms reduction during their walk in the Geneva woods); *Shadowlands* (on C.S. Lewis and Joy Davidson); *Execution of Justice* (the trial of Dan White for the murder of Harvey Milk and San Francisco Mayor George Moscone); *God's Country* (dramatization of the murder of Denver talk show host Alan Berg by members of a white supremacist group). Opera also has utilized the format, for example in *Nixon in China*, as have popular singers. Johnny Horton sings of the World War II hunt for the German battleship Bismark in *Sink the Bismark*, and quotes Winston Churchill as improbably saying: "Put every ship asail, *'cause* somewhere on that ocean, I know she's *gotta* be, we *gotta* sink the *Bismark* to the bottom of the sea." Johnny Horton, *Greatest Hits*, track 10, *Sink The Bismark* (emphasis added).

false facts)[36] to works that admittedly are comprised of both fiction and fact. Many cases illustrate the inevitable clash between the law's search for fact (and the occasionally elusive distinction between protected truth and actionable falsity) and the author's license for creative expression, in which fictional elements are often blended with stories based on real events.[37] In this confusing mixture, courts have criticized creative works for being both too fictional and not fictional enough.

Whether traditional defamation analysis makes sense when applied to such works need not be answered at this time by the Court.[38] Petitioner, however, broadly argues that "the Court has a duty to discourage the publication of false quotes," Brief for Petitioner at 19, and contends that the First Amendment should not protect any "deliberately altered and manufactured quotations." *Id* at 22. Despite his protestations to the contrary, petitioner offers no principled basis to limit this literalistic rule to jour-

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[36] *Philadelphia Newspapers v. Hepps*, 475 U.S. at 773-74 ("Any analysis must also take into account the 'legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

[37] George Herbert's caution, "[g]o not for every grief to the physician, nor for every quarrel to the lawyer, nor for every thirst to the pot," G. Herbert, *Jacula Prudentum* 290 (1651), seems apt for an area where legal analysis can easily misapprehend the creative work. The result has sometimes been akin to the outcome of those who literally interpreted the fictional work of Salmon Rushdie, *The Satanic Verses*, and condemned him to death for allegedly blashpheming Muhammad's wives by calling them prostitutes, when Rushdie wrote a brief fantasy of prostitutes who adopted the names of Muhammad's wives.

[38] Some have suggested that a test that presumes a distinction between true and false facts cannot rationally be applied to such works. *See generally*, Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. Pa. L. Rev. 1065 (1978).

nalism while preserving other forms of expression from its application and its consequences.[39]

Adoption of petitioner's proposed constitutional rule would, in effect, create strict liability for creative writers who blend fact and fiction and who, in doing so, inevitably employ "altered or deliberately manufactured quotations."[40] This Court should avoid any such draconian result in reaching its decision here.

A. Cases About Docudramas Illustrate the Confusion Created by Literalistic Legal Analysis.

Docudramas, as well as filmed and written works of pure fiction, have been attacked through claims of defamation and invasion of privacy.[41] While these lawsuits are perhaps not surprising in our litigious times, the courts' analyses and results in the cases have been

[39] Indeed, petitioner's reliance on *Bindrim* belies his assurances that easy distinctions can be made between fiction, journalism, or creative blends of fiction and juornalism.

[40] The breadth of the language used in the dissent below also highlights the danger to docudramas: "what somebody says is a fact, and . . . doctoring a quotation is no more protected by the first amendment than is any other falsification." *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1562 (9th Cir. 1989) (Kozinski, J., dissenting). A docudrama writer knows the work he or she is writing is not, in its narrow, literal sense, "true." If the defamation plaintiff establishes that knowledge, then (the plaintiff will assert) "knowing falsehood" and thus actual malice has been proven as a matter of law. Even the majority opinion below could be broadly interpreted to foreclose constitutiona! protection for docudramas. "A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination." *Id.* at 1539.

[41] Other claims against docudramas also have been brought. *See, e.g., Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (upholding denial of motion for prior restraint of television docudrama on crimes allegedly committed by Joe Hunt); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1979) (reversal of entry of prior restraint order that allowed the district court to review a docudrama, prior to broadcast, for "inaccuracies" that might be harmful to plaintiff).

varied and inconsistent[42] because of the difficulty in squaring a fact-based defamation test with the creative works and fictional characters that are challenged.[43] The cases divide on whether the work should be tested under traditional defamation "of and concerning" standards, whether the portrayal is substantially accurate, whether the story would be plausible to a reasonable reader or viewer, and whether fictionalization is equivalent to actual malice. As the decisions demonstrate, unpredictability is the common thread.

Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *supra*, a case in which the court mechanically applied defamation analysis to a fictional novel, typifies the problem.[44] In *Bindrim*, the plaintiff argued that the novelist's creation of a charcter named Hereford, who did not speak, look like, or have the same name or medical degree, was a false and defamatory depiction of him.[45] Be-

[42] *See generally* Franklin, *Fiction, Libel, and the First Amendment*, 51 Brooklyn L. Rev. 269 (1985). As Professor Franklin notes of the defamation cases against works purporting to be fiction, "courts are divided as to . . . the means of determining liability and . . . seem to be using inappropriate tools and distorting doctrine. . . . That kind of groping, suggestive of an underlying doubt, warrants the attention of the legal community." *Id.* at 272.

[43] *See* Silver, *supra* n.38, at 1067. Professor Silver analyzes defamation law in the context of the modern literary art form in novel writing of "faction." "One might describe the novel of 'faction' as one that adheres fairly closely to historical fact as a foundation for psychological speculation about—or 'mythologizing' of—the real persons and events it describes." *Id.* at 1067 n.10.

[44] *See* Wilson, *The Law of Libel and the Art of Fiction*, 44 Law & Contemp. Prob. 27, 30 (1981) ("*Bindrim v. Mitchell* is an example of the casuistry that results from the effort to apply the present constitutional law of libel to the art of fiction.").

[45] Motion pictures are subject to the additional risk that plaintiffs will contend they are identified by the physical appearance of the actors, though not in name. *See Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 820 (D.D.C. 1955). *Bernstein* involved an invasion of privavy claim by a man convicted of murder and later pardoned. NBC telecast a docudrama of the story 12 years after

cause the author admittedly had drawn her book from a personal encounter with the plaintiff in a therapy session,[46] and despite the differences in physical characteristics, name, and speech used by the character and the plaintiff, the court affirmed a jury finding that the plaintiff was the character Hereford. The court held that there was a sufficiently "close parallel"[47] between the fictional and the real therapy session to make the plaintiff identifiable, and thus concluded that the novel was "of and concerning" the plaintiff. *Id.* at 75-76, 155 Cal. Rptr. at 37-38.

Once this hurdle was passed, a mechanical application of the actual malice test automatically led to a finding of

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he was pardoned. Bernstein's name was not used, but he alleged that the actor portraying him looked like him, and also identified nine other similarities between his life story and the drama. Finding him a public figure for purposes of this story, that the incidents were not private, and that he was not identified, the court denied liability.

[46] Use of personal experience is, of course, a standard literary tool. Few would suggest that Herman Melville, for example, could write *Moby-Dick* without any reliance on his own experiences as a young man on whaling ships. On the contrary, one commentator has noted that in many respects, the book was "very close to his earlier writings: thinly veiled autobiography used as a vehicle for personal reflection and topical information (in this case about the American whalers)." H. Melville, *Moby-Dick, or The Whale* xxi (C. Feidelson ed. 1964).

[47] The court apparently assumed that there was something inherently suspect in drawing upon life experience in the creation of fiction. Yet, authors often rely on real people as a basis for their fictional characters. Even a work as fantastic as James Joyce's *Ulysses* is premised, in part, on people Joyce knew. One commentator, for example, has discussed "many obvious parallels between the real woman [Nora Joyce, the author's wife] and the fictional creation in Joyce's text [Molly Bloom]." B. Maddox, *Nora* 199 (1988). *See generally* J. Joyce *Ulysses* (Shakespeare ed. 1922). Although Joyce's characters did not exactly mimic their real counterparts, the novelist "sought to draw a true picture of the lower middle class in a European city." *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

liability. Because the therapy session might be understood to describe the plaintiff, and because the defendant had known the "true facts" from actually attending sessions, 92 Cal. App. 3d at 72-73, 155 Cal. Rptr. at 35-36, any variation, including invented dialogues, was equated to knowing falsity.[48]

As *Bindrim* shows, one of the principal problems for fictionalization is the courts' readiness to permit a plaintiff to bring a claim based on the author's use of fictional figures. *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901 (8th Cir. 1951), involved a movie, *Fighting Father Dunne*, that sought to describe Father Dunne's charity home in St. Louis. One of the fictional characters in the movie was named Matthew Davis, which was also the name of an actual former resident of the home. The real Davis exhibited no antisocial behavior and did not violate the law; the fictional Davis, however, was a juvenile delinquent who committed larceny, burglary and, eventually, murder. Although the jury found for the defendant on Davis' defamation claim, the mere existence of similarities between the plaintiff and the fictional character was sufficient to require submission to the jury.

If an author can concoct enough dissimiliarities between the fictional and those real characters who might sue, however, the court may permit the work to escape liability. Thus, in *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App. 3d 384, 219 Cal. Rptr. 891 (1985), the court

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[48] Certainly, Thomas Jefferson would have had grounds to sue Washington Irving under the analysis of *Bindrim*:

> Language cannot express the awful ire of William the Testy . . . his rage was too great for words, or rather the words were too great for him (being a very small man), and he was nearly choked by the misshapen, ninecornered Dutch oaths and epithets which crowded at once into his gullet. At length his words found vent, and for three days he kept up a constant discharge, anathematizing the Yankees . . . for a set of dieven, schobbejacken deugenieten, twistzoekeren [etc., etc.]. . . .

W. Irving, *Knickerbocker's History of New York*, Book IV, Ch. IV; *see also supra* n.24 (whether the work was of and concerning Jefferson).

closely scrutinized the similarities between the plaintiff, Bertha Aguilar, and the character "Bertha" in the movie *Zoot Suit* and found that, despite similar names and Ms. Aguilar's connections with the Zoot Suit gang, the differences between the real person and the fictional character were so great that no reasonable person could connect the two. Yet cases like *Davis* and *Aguilar*, where producers avoided liability because of the absence of identity between fictional characters and real plaintiffs, might have turned out differently if "real" people had been depicted.

Another line of cases focuses not on identification of the plaintiff, but rather on the existence of substantial accuracy as a basis for protecting docudrama. In *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970), Nathan Leopold brought an invasion of privacy action against the creators of a book and motion picture called *Compulsion*, inspired by his and Richard Loeb's kidnaping and murder of a fifteen-year-old boy. The characters in the creative works were not identified as either Leopold or Loeb, but the framework of their crimes was the outline of the story. Assuming that Leopold was sufficiently identifiable, the court nonetheless denied liability because the fictionalized portrayal was reasonably comparable to or conceivable from the facts of record. 259 N.E.2d at 256.

In *Davis v. Costa-Gavras*, 654 F.Supp. 653 (S.D.N.Y. 1987), the court also assumed identification of the plaintiff through a fictional character, yet refused to permit a defamation claim. Davis claimed to be defamed by the movie *Missing*, which portrayed the disappearance and apparent murder of an American, Charles Horman, during the 1973 military coup in Chile that toppled the Allende regime. *Id.* at 655. Ray Davis alleged that he was depicted as the American Ray Tower in the movie,[49]

[49] As the two *Davis* cases and *Aguilar* indicate, mere similarity of name is frequently sufficient to mount a defamation or invasion of privacy attack on a fictional work or docudrama. Yet, as the court noted in *Aguilar*, "[i]n a country of this size, containing all nationalities, it would be truly remarkable if an author used a name which was possessed by no one. Only the creator of 'Mork' from Ork would appear to be safe." *Aguilar*, 174 Cal. App. 3d at 391, 219 Cal. Rptr. at 894.

and that Tower, the fictional character, ordered or approved Horman's killing during the overthrow of the socialist government in Chile.

In granting summary judgment for the defendants, the court noted that the Tower character was a dramatic composite of the American presence in Chile—in essence, a symbolic figure. *Id.* at 658. Hence, Davis' defamation claim should have failed because the movie was not "of and concerning" him.[50] But recognizing the contradiction between literal application of the actual malice rule and the nature of docudramas, the court went on to dismiss the case:

> The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted; publishing a dramatization is not of itself evidence of actual malice.

Id.[51]

[50] The case illustrates another problem created by petitioner's proposed rule. If, as the court suggested in *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976), "a journalist does not invent quotations and attribute them to actual persons," how does the director of *Missing* create his drama about the disappearance of Charles Horman during the Pinochet coup? The movie presented a compelling tale of the United States government's possible complicity in Horman's disappearance or at least indifference to Horman's situation. To do this, the director used a symbolic figure—in this case the Chief of the United States Mission to Chile. Yet, if the *Davis* court had adopted the *Bindrim* "of and concerning" analysis, the fact that there was only one Chief of the United States Mission in Chile at the time of the 1973 coup would establish that the statements by the fictional Tower in the docudrama were "of and concerning" the real Davis. And, if misquotations may result in libel liability, then the dramatist must avoid the use of any Tower character for fear of creating liability to Davis. In short, the story would not have been told.

[51] The Court of Appeals for the Sixth Circuit reached a similar result regarding a docudrama of the Scottsboro rape trial. In

B. Petitioner's Rule Would Further Confound Litigation Over Docudramas.

The contradictory and unpredictable results in these cases already require the creative writer and producer to walk a razor's edge between completely made-up characters and strict adherence to real events.[52] Under *Bindrim*, invented quotations may be sufficiently "false" to demonstrate falsity and actual malice, while simultaneously sufficiently "true" to be of and concerning a particular plaintiff, even though the author attempted to create a fictional work based on his or her own experiences.[53] Under cases such as *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250, *supra*, and *Street v. NBC*, 645 F.2d 1227,

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Street v. NBC, 645 F.2d 1227, *supra*, the principal complainant and witness in the actual trial sued for libel and invasion of privacy for NBC's docudrama based on the events of the trial. The movie fictionalized language from the trial transcript, but the court found the allegedly defamatory portion "an accurate abridgement of the substance of the actual testimony." *Id.* at 1232. Although the court found that Street's portrayal was dafamatory, it held there was no liability because she had not demonstrated that the portrayal was false or that NBC recklessly disregarded the truth. Despite the altered quotations, this was not, the court concluded, "the 'big political lie,' the conscious or reckless falsehood." *Id.* at 1237.

[52] The issues of identification and substantial accuracy are further complicated by the question whether the portrayal is plausible. This Court, in *Hustler Magazine v. Falwell*, 485 U.S. at 55, held that the outrageousness of a fictional portrayal of a public figure was an insufficient basis for liability, if a reasonable person could not have believed it conveyed actual facts. Similarly, in *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), the court determined that the allegedly defamatory story simply was not believable and therefore defamation liability could not attach. This split decision reversed a $14 million judgment entered by the district court. *See* Franklin, *supra* n.42, at 271-72.

[53] Obviously, despite petitioner's claim that he seeks only limited relief from this Court, *see* Brief for Petitioner at 26, the *Bindrim* court's imposition of liability based on fictionalized quotations in a work of fiction suggests that the danger may be far greater than petitioner admits.

supra, an author safely may identify a real person, but only if a court does not later disagree with the gist of the portrayal of that real person.

All of these cases, however, demonstrate a clash of disciplines between the fact-sensitive and lawyerly analysis of defamation law, and the imaginative and creative author's realm of drama. The former tests facts (which are presumably provable as true or false) in an adversary setting.[54] The latter creates scenarios of what could have been or what might have happened, and creatively expresses a more "true" view of human nature and experience.[55]

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[54] Even in this process, law has its inherent limitations. As Justime Holmes has noted, law is "a business with well understood limits, a body of dogma enclosed within definite lines." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

[55] *See, e.g.*, K. Kesey, *One Flew Over the Cuckoo's Nest* 8 (Penguin ed. 1976) ("But it's the truth even if it didn't happen."). Indeed, the truth as portrayed by a creative writer sometimes diverges from a lawyer's presentation of what is true. "The lawyer's truth is not Truth, but consistency or a consistent expediency." H. Thoreau, *Civil Disobedience*, in *Reform Papers* 87 (W. Glick ed. 1973). As one legal commentator has noted:

> This new aesthetic of the American Renaissance excludes the legal mind from literary enterprise. Hawthorne can describe the possibilities in a moonlit room, and Melville can tell Hawthorne that "truth is ever incoherent," but in the law reality is always otherwise. Practitioners with clients must deal in facts, certainty, affirmation, and assurance. They accept complexity and nuance only to solve problems. Reason is their tool; institutional continuity, their control. Of the emotional vortices and philosophical doubts that undermine the professional search for answers, they have little to say. Plays upon the ambiguous, the unique, and the bizarre—these possibilities excite the modern writer, and they also run counter to every lawyer's interests and goals. Since 1850 the best American writers have aimed for an original show of consciousness. Lawyers have throught ever more consciously of standards, norms, and rules.

R. Ferguson, *Law and Letters in American Culture* 271-72 (1984); *see also* Ayer, *The Very Idea of "Law and Literature,"* 85 Mich.

This case offers yet another peril to docudramas and other works that blend fact and fiction. An author's ability to create would be curtailed severely if a constitutional rule broadly mandating "journalistic excellence" through verbatim quotation is adopted by this Court. If misquotation is treated as knowing falsity, and if the lower courts fail to recognize that "misquotation" is inherent and necessary to docudramas and some works of fiction, then the rule advanced by petitioner would have consequences far beyond the confines of this case.

This broad reach of petitioner's proposed rule is fundamentally contrary to the principle that governmental regulation of the expression of ideas is strictly limited by the Constitution. As the Court stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), it is "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." [56] Given the potential consequences of the proposed rule, Amici believe that the Court should decline petitioner's invitation to impose judicial supervision of journalistic ethics, not just on journalism but on all expressive speech.[57]

L. Rev. 895, 895 (1987) ("When all was said and done, law was one thing and literature another.").

[56] *See also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984) (independent appellate scrutiny is necessary "to confine the perimeters of any unprotected category [of speech] within acceptably narrow limits"); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (any restraint on First Amendment freedoms "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

[57] Petitioner urges judicial intervention to combat the alleged woes of allegedly poor journalistic practices. But as Judge Kozinski noted and petitioner concedes, scholars and writers are in fact addressing the question whether alteration of a quotation constitutes good journalism. *Masson v. New Yorker Magazine, Inc.*, 895

III. A VERBATIM QUOTATION RULE WOULD UNDERMINE THIS COURT'S CAREFUL BALANCE BETWEEN FIRST AMENDMENT PROTECTION OF SPEECH—PARTICULARLY LITERACY SPEECH—AND THE STATES' INTEREST IN REDRESSING HARM TO REPUTATION.

The protection of reputation is the legitimate State interest that supports the law of libel. *Gertz*, 418 U.S. at 341. As the Court has observed, protection of reputation "'reflects no more than our basic concept of the essential dignity and worth of every human being.'" *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

However, the inevitable tension between providing redress for reputational harm and protecting full freedom of expression has required this Court, since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to "struggle[] . . . to define" the balance between protection of freedom of expression and the States' sanctions for defamatory falsehood. *Gertz*, 418 U.S. at 325; *see id.* at 342.

This balance could have been struck on a case-by-case basis, with this Court potentially scrutinizing every jury

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F.2d at 1558-62 (Kozinski, J., dissenting); Brief for Petitioner at 23 (noting that "the press has emphatically rejected" the practice).

Apparently dissatisfied with public debate, petitioner asserts that this "Court has a duty to discourage the publication of false quotes," Brief for Petitioner at 19, and that courts generally "have a duty to discourage the publication of . . . deliberately fabricated quotes." *Id.* at 28. But Amici believe that this case does not create any new "duty" for the courts. Not every societal problem mandates a judicial solution. Rather, this is an appropriate case for the Court to exercise judicial restraint as the Court and some of its members have observed in other areas of the law. *See, e.g., Spallone v. United States*, 110 S. Ct. 625, 635 (1990) ("'a court must exercise "[t]he least possible power adequate to the end proposed"'") (quoting *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)); *Florida v. Wells*, 110 S. Ct. 1632, 1640 (1990) (Stevens, J., concurring in the judgment) ("to reach out . . . unnecessarily to make new law in a case of this kind is unabashed judicial activism").

verdict in every libel case " 'to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate State interest in protecting the particular plaintiff who prevailed.' " *Gertz*, 418 U.S. at 343 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting)). However, recognizing the need to provide guidance to litigants and to the courts below, the Court in *Gertz* determined that "we must lay down broad rules of general application." *Id.* at 343-44. As developed in *Gertz* and its progeny, these general rules differentiate among defamation plaintiffs and establish the constitutional standards that must be satisfied by libel plaintiffs, providing an "equitable boundary" between the competing concerns of the States and the First Amendment. *See Gertz*, 418 U.S. at 347-48.

The application of these rules has been evolutionary. For example, the meaning of a term such as actual malice "is not readily captured in 'one infallible definition.' " *Harte-Hanks Communicaitons, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)). Also, the Court has carefully extended the plaintiff's constitutional burden in cases involving speech of public concern beyond proof of actual malice with convincing clarity to include proof of falsity. *Philadelphia Newspapers v. Hepps*, 475 U.S. at 768. Having established these constitutional guidelines, the Court has left their application to case-by-case determinations.[58] These subsequent adjudications have given substance to the otherwise somewhat "elusive constitutional standards." *Harte-Hanks*, 109 S. Ct. at 2695.

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[58] Beyond the constitutionally-required minimums, the content of some defamation elements is appropriately left to the States. *See, e.g., Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

Now, however, petitioner would have the Court abandon its balanced development of those guidelines and impose an automatic rule for verbatim quotations that would presume both actual malice and loss of reputation from misquotation. Indeed, petitioner's proposed rule would effectively eradicate the constitutional burden of proof assigned to the defamation plaintiff by this Court. Rather than requiring the plaintiff to demonstrate that the substance of a statement was false and defamatory, and thus damaging to his or her reputation, the plaintiff would simply be put to a mechanical proof that the quotation was inaccurate. If so, petitioner argues, it would necessarily follow that the misquote must be false and harmful to reputation, and, further, that the misquote demonstrates actual malice because the writer knew what the speaker really said.

Careful application of this Court's defamation balance is particularly critical where the "square peg" of journalistic rules is forced into the "round hole" of literature and drama. The First Amendment protects the widest variety of expression of ideas, values, and tastes.[59]

Thus far, this Court has avoided injection of the adjudicative process into artistic creativity and the expression of ideas.[60] Rather, the Court has stated, "there is no such thing as a false idea. . . . [W]e depend for its correction not on the conscience of judges and juries, but

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[59] *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946). "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals, as it does from one generation to another. . . . What seems to one to be trash may have for others fleeting or even enduring values." *Id.* at 157-58. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

[60] Judicial restraint is sound policy in these circumstances. As Judge Posner has noted, "[t]he law is not one of the humanities, but a branch of government." Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1392 (1986).

on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.[61]

In docudramas and other dramatic literature, allegation that a quotation was created should not substitute for clear and convincing proof of the type of defamatory falsehood that the Court requires under the carefully balanced *Gertz* formulation—publication of a false statement that actually causes damage to the plaintiff's reputation. The inconsistent and confused results in the opinions of lower courts already illustrate the risks in mechanically drawing the boundaries between art and libel.[62] Misquotation alone should not secure a plaintiff's recovery for libel. If "the Court has a duty to discourage the publication of false quotes," Brief of Petitioner at 19, how will works of fiction or fictionalization fare when courts embrace this new "duty"? Unless First Amendment protection of expressive speech is to be eviscerated, fiction must not be equated with falsehood in the law of defamation, and misquotation should not be a substitute for the plaintiff's traditional evidentiary burdens.

In its defamation decisions, the Court has carefully balanced the fundamental principles of the First Amendment with the States' legitimate interest in redressing actual harm to reputation. Amici urge the Court to reiterate the teaching of its earlier cases and reject petitioner's suggested judicial "duty" to root out alleged misquotations from American journalism and literature. The significant dangers posed by petitioner's rule to expressive speech demonstrate that the Court should reject

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[61] *See also Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2705 (" '[T]he ultimate good desired is better reached by the free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.' ") (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[62] As Professor Silver has cautioned, "our goal should be to expose the often subtle ways that mechanical application of the law may ignore the writer's craft and constrain artistic freedom." Silver, *supra* n.38, at 1098.

any mechanical surrogate as an alternative measure of defamation liability.

CONCLUSION

For the foregoing reasons the Amici respectfully urge this Court to affirm the judgment and decision of the Court of Appeals.

DATED this 17th day of December, 1990.

Respectfully submitted,

Of Counsel:
JOHN S. REDPATH, JR.
SHARI L. PATRICK
Home Box Office, Inc.
1100 Avenue of the Americas
New York, N.Y. 10036
Attorneys for Home Box Office, Inc.

ROBERT D. CUNNINGHAM
Buena Vista Pictures Distribution, Inc.
3900 W. Alameda Ave.
Burbank, Ca. 91521
Attorney for Buena Vista Pictures Distribution, Inc.

RONALD E. GUTTMAN
Columbia Pictures Entertainment, Inc.
3400 Riverside Dr.
Burbank, Ca. 91505
Attorney for Columbia Pictures Entertainment, Inc.

BRENDAN P. BOVAIRD
Orion Pictures Corporation
1325 Avenue of the Americas
New York, N.Y. 10036
Attorney for Orion Pictures Corporation

DAVID Y. HANDELMAN
Twentieth Century Fox Film Corporation
10201 West Pico Blvd.
Los Angeles, Ca. 90213
Attorney for Twentieth Century Fox Film Corporation

P. CAMERON DEVORE *
DANIEL M. WAGGONER
BRUCE E. H. JOHNSON
R. BRUCE EASTER, JR.
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

APPENDIX

IDENTITIES OF INDIVIDUAL AMICI

Home Box Office, Inc., is a corporation that provides premium television programming by means of two subscription television services, HBO and Cinemax, to subscribing viewers throughout the United States. The HBO and Cinemax services telecast feature length motion pictures licensed to Home Box Office, Inc., as well as other television programs that are produced by or for Home Box Office, Inc. Currently, the HBO service is provided to 17.3 million subscribers and the Cinemax service is provided to 6.4 million subscribers.

Buena Vista Pictures Distribution, Inc., is a corporation and a wholly-owned subsidiary of The Walt Disney Company. Buena Vista distributes for theatrical release motion pictures, including docudramas, produced or financed by other companies including Walt Disney Pictures and Television, Touchstone Pictures, and Hollywood Pictures.

Columbia Pictures Entertainment, Inc., is a corporation and the owner of Columbia Pictures Industries, Inc., and Tri-Star Pictures, Inc., both of which finance, produce and distribute motion pictures, including docudramas, for theatrical release, as well as release to broadcast and subscription television and the video cassette market.

Orion Pictures Corporation, Paramount Pictures Corporation, and Twentieth Century Fox Film Corporation are each corporations that are engaged in the financing, production, and distribution of motion pictures, including docudramas, for theatrical release, as well as release to broadcast and subscription television and the video cassette market. Each company also participates in the financing, production, and distribution of television programming.

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No. 89-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. and
JANET MALCOLM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF RESPONDENTS

JOSEPH R. BANKOFF *
JAMES D. MILLER
DAN H. WILLOUGHBY, JR.
LISA A. LINDSTROM
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500

* *Counsel of Record for Amici Curiae*

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(List of Counsel Continued on Inside Cover)

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JANE E. KIRTLEY
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
Suite 504
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 466-6313

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660
Counsel for Radio-Television News Directors Association

W. TERRY MAGUIRE
RENÉ P. MILAM
AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
P. O. Box 17407
Dulles Airport
Washington, D.C. 20041
(703) 648-1000

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500
Counsel for the Society of Professional Journalists

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STATEMENT OF INTEREST

The news organizations filing this brief with the consent of the parties as *amici curiae* have a vital interest in the outcome of this case. Petitioner seeks to make the courts and juries arbiters of journalistic standards and ethics. The court below correctly refused to modify its constitutional inquiry to incorporate such standards. In-

stead, the court applied settled constitutional standards for granting summary judgment in libel cases. *Amici* seek affirmance of that process and the decision in this case. The decision below does not support or require either a rule that constitutionally immunizes fabricated quotations or a rule imposing constitutionally mandated standards of journalism.

Amici bring to this case the perspective of a substantial segment of the nation's media who are directly affected by this Court's decisions in the areas of first amendment protections. The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the first amendment interests of the news media. Since 1970, the Reporters Committee has provided representation, information, legal guidance or research in press freedoms cases throughout the country.

The American Newspaper Publishers Association ("ANPA") is a nonprofit trade association representing approximately 1,400 newspapers. ANPA's membership constitutes approximately 90 percent of the total daily and Sunday newspaper circulation in the United States, as well as a substantial portion of the non-daily newspaper circulation. These newspapers have the basic function of gathering and disseminating news and information.

The Radio-Television News Directors Association, with a membership of more than 3,600 persons, is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the United States.

The Society of Professional Journalists is a voluntary, nonprofit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism. Preservation of

first amendment freedoms is of deep concern to the Society.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts as set forth by respondents.

SUMMARY OF ARGUMENT

This case does not present reasons for either expanding or limiting the established "constitutional zone of protection" for errors of fact. *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971). Existing constitutional guidelines provide the proper rules of decision in this case. Petitioner's efforts to change those guidelines to reflect or impose journalistic standards are unwarranted and inappropriate.

The court below correctly applied this Court's settled standards for granting summary judgment in a public figure libel case: it examined the circumstances of petitioner's case to determine whether a reasonable jury could find that respondents published material that was substantially untrue and defamatory, and that respondents did so with serious doubts about the truth of the allegedly defamatory publication. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512-13 (1984). Because petitioner did not satisfy this burden of proof, summary judgment for respondents was granted. The court below conducted the appropriate constitutional inquiry, an inquiry which this Court has determined strikes the necessary balance between first amendment protections and individual rights in libel cases. *See Milkovich v. Lorain Journal, Inc.*, 497 U.S. ——, 110 S. Ct. 2695 (1990).

ARGUMENT

I. THIS CASE OFFERS NO JUSTIFICATION FOR ALTERING THE EXISTING CONSTITUTIONAL BALANCE IN DECIDING MOTIONS FOR SUMMARY JUDGMENT IN LIBEL CASES

Established guidelines that balance first amendment protections with the rights of individuals are adequate to decide the outcome of this case; it is not necessary or appropriate to develop any additional first amendment protection. *See Milkovich*, 497 U.S. ——, 110 S. Ct. 2695 (1990). While this is a highly publicized case, it nonetheless presents no new first amendment issues. The case may fairly raise questions as to the proper application of this Court's established rules, but it does not stand for the proposition that the Constitution gives "license to invent quotations." *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1553 (9th Cir. 1989) (Kozinski, J., dissenting). Nor is it a basis for a determination that inaccurate quotations warrant no first amendment protection.

This Court has established the appropriate inquiry for a motion for summary judgment in a public figure libel case:

> Where a factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record can support a reasonable jury finding . . . that plaintiff has shown actual malice by clear and convincing evidence.

Anderson, 477 U.S. 242, 255-56 (1986). This guideline requires a court to test the objective falsity of the allegedly defamatory publication and, under the standard of clear and convincing evidence, the publisher or writer's subjective knowledge or disregard of its falsity. *Id.* at 252; *Bose*, 466 U.S. at 510-11; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The court below

adhered to this standard in affirming summary judgment for respondents.

This inquiry makes clear that summary judgment is neither properly granted nor denied based on the bare assertions of either party. *See, e.g., Anderson*, 477 U.S. at 252 ("mere existence of a scintilla of evidence . . . insufficient" to satisfy the clear and convincing evidence standard as there must be evidence on which the jury could reasonably find for plaintiff); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (libel defendant cannot insure favorable verdict by asserting belief that statements were true; finder of fact must determine if publication made in good faith).

Similarly, the existence of demonstrable inaccuracies in a quoted statement does not automatically create a triable issue of fact on actual malice. Summary judgment is proper where the statement is substantially true or where it was reasonably believed by the publisher to be true. Guided by the clear and convincing evidence requirement, this Court has determined that evidence which is "merely colorable" or "not significantly probative" is not sufficient to overcome summary judgment. *Anderson*, 477 U.S. at 250 (citations omitted); *see also Bose*, 466 U.S. at 513 (1984) (inaccuracies in published materials are expected in a "forum of robust debate"). If the substantial truth of the statement is not examined as probative of actual malice at summary judgment, then every claim of inaccuracy, regardless of its merits or triviality, will result in a trial.

In assessing evidence of actual malice, the alteration of quoted material is to be treated like all other assertions of fact. Quotes are subject to a myriad of potential criticism, each producing the claim that the quotes were "deliberately altered." Petitioner here alleged that his quoted statements were untrue for a number of reasons commonly asserted in libel cases: petitioner claimed

some quotes were false for what was made up; some for what was put in; some for what was left out; some for where it was said; some for when it was said; and some for what was implied by what was said.

The court below was satisfied that the substance of the quotations at issue was not the product of the writer's imagination or completely fabricated. *E.g.*, 895 F.2d at 1541. Presented with claims that the quotations nevertheless were substantially untrue, the court below carefully examined the petitioner's evidence regarding allegedly altered or inaccurate quotations. The court made the required independent examination of the record, and determined that a reasonable jury could not conclude that they were substantially untrue or incorrect. 895 F.2d at 1539-46.

The court also correctly examined all the circumstances to see if a reasonable jury could find by clear and convincing evidence that respondents entertained serious doubts about the truth of the publication. The court found that respondents did not publish the articles with such actual malice. *Id.*

Inherent in these findings is the court's determination that the job of editing must remain with the editor. This Court has recognized that the nature of the media's task requires editorial decisions and the exercise of judgment in selecting portions of statements and in choosing whether and how selected material shall be presented. *See Bose*, 466 U.S. at 512-13 (editorial choice of one of a number of possible interpretations, "though reflecting a misconception, does not place the speech beyond the outer limits of the first amendment's broad protective umbrella"); *Pape*, 401 U.S. at 289-90 (adoption of one of a number of possible rational interpretations of an ambiguous document is not denied first amendment protection). These cases establish that editorial latitude is essential to first amendment values of free expression and full debate.

The decision below does not create a constitutional right to misquote intentionally or recklessly, or a constitutional right to report false facts intentionally or recklessly. *Amici* urge affirmance of the decision below because the court appropriately invoked established constitutional standards, and conducted an inquiry to determine whether petitioner showed by clear and convincing evidence that respondents acted in reckless disregard for the truth in allegedly misquoting or inaccurately quoting the petitioner. This Court has determined that such an inquiry accommodates both the open and robust debate protected by the first amendment and an individual's right to challenge allegedly defamatory statements that are published intentionally or with reckless disregard for the truth. *Milkovich*, 497 U.S. ——, 110 S. Ct. 2695, 2707-08 (1990).

II. IT IS INAPPROPRIATE AND UNNECESSARY FOR A COURT TO APPLY JOURNALISTIC STANDARDS OR ETHICS WHEN DECIDING WHETHER A LIBEL PLAINTIFF'S CASE SATISFIES THE REQUIREMENT OF CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE

This Court emphasized in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ——, 109 S. Ct. 2678 (1989), that even a showing of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is not sufficient to establish actual malice. *Id.* at 2684-85, *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Yet petitioner urges this Court to rely upon such standards to do precisely that, maintaining that these extra-legal standards

> will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment.

Petitioner's Brief at 24. *Amici* urge the Court to abide by well-established precedent and refuse to undertake the evaluation suggested by petitioner.

The problems inherent in the adoption of a "constitutional standard of journalism" are amply illustrated by Judge Kozinski's dissent in the Court of Appeals. 895 F.2d at 1548-70. The dissent notes the extensive debate about, and condemnation of, misquotes or inaccurately stated quotations, citing textbooks, journalism manuals, trade articles and even comments by the former Editor-in-Chief of *The New Yorker* magazine. *Id.* at 1558-62. The dissent argues that since false quotes are widely condemned they should be distinguished from other kinds of false or erroneous facts which may be published, and excluded from the constitutional protection otherwise afforded vigorous and even unpleasant discussion.

The continuing debate over what are proper journalistic ethics suggests that such standards are not useful measures of constitutional protections. It is inappropriate to base constitutional protections on such ethical standards, particularly when, because of the first amendment, the state may not license or impose standards in regulation of journalists as it does for the legal and medical professions. Furthermore, these ethical standards may not necessarily apply with equal force to all sources and publications. Such standards are certainly no easier to use than the existing constitutional rules. Indeed, the constitutional rules were designed to protect the function of editors and the necessary editorial discretion to embrace potentially conflicting ethical judgments made by authors and editors.

This Court repeatedly has rejected claims that all practices that would be "good" or "fair" journalism can be imposed by the power of the state. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a statute requiring newspapers to give equal space to candidates the newspaper criticizes); *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967) (recognizing that public official must show more than departure from professional standards to prove actual malice); *see also St. Amant v. Thompson*, 390 U.S. at 731 (1968) (*New York Times* and its progeny make clear that "reckless conduct is not measured by whether a reasonably prudent man" would have published the material at issue).

The continuing debate over journalistic ethics shows that a "bright line" test as to accuracy of quotes is not an adequate measure of substantial truth. *See Pape*, 401 U.S. at 286 (recognizing the set of choices confronting an editor when departing from full direct quotation); *see also Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (protecting use of the word "blackmail" when material containing that word cannot reasonably be interpreted as stating an actual fact). The inaccurate or altered quote is not a goal of good journalists. But standing alone, a change in words without a change in meaning is not a sufficient basis to strip the reporting and editorial process of the protections accorded speech.

The first amendment does not protect only "ethical" journalists. The history of speech in this country shows that unpleasant and extreme speech is tolerated not because it is model journalism, but because it is necessary to protect the process by which we seek to inform ourselves of the full range of ideas and expression.

Amici suggest that the pressures of the public, the marketplace and the journalistic community properly and adequately discipline transgressions such as those alleged by petitioner here. This Court has determined that absent clear and convincing evidence of serious doubts as to truth, we rely upon public figures to correct inaccurate statements or quotes through further speech, rather than placing upon each reporter the obligation of reporting with what is later determined by a court to be stenographic accuracy. Journalistic standards and ethics may dictate that altered quotations are not appropriate, but these guidelines should not be the basis for new constitutional standards.

CONCLUSION

For the reasons stated above, *amici* Reporters Committee for Freedom of the Press, American Newspaper Publishers Association, Radio-Television News Directors Association, and the Society for Professional Journalists urge that the decision of the court below be affirmed.

Respectfully submitted,

JOSEPH R. BANKOFF *
JAMES D. MILLER
DAN H. WILLOUGHBY, JR.
LISA A. LINDSTROM
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500

* *Counsel of Record for Amici Curiae*

JANE E. KIRTLEY
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Suite 504
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 466-6313

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660
Counsel for Radio-Television News Directors Association

W. TERRY MAGUIRE
RENÉ P. MILAM
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
P. O. Box 17407
Dulles Airport
Washington, D.C. 20041
(703) 648-1000

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500
Counsel for the Society of Professional Journalists

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

—v.—

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND MAGAZINE PUBLISHERS OF AMERICA, INC., AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

ROBERT G. SUGARMAN*
R. BRUCE RICH
LINDA STEINMAN
RONALD KLEMPNER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel for *Amici Curiae*

*Counsel of Record

Of Counsel:

TINA A. RAVITZ
SLADE R. METCALF
LAURA R. HANDMAN
MAGAZINE PUBLISHERS
OF AMERICA, INC.

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STATEMENT

The Association of American Publishers, Inc. and Magazine Publishers of America, Inc. (collectively referred to as "*amici*") submit this joint brief *amici curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, urging affirmance of the judgment of the court below. The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

THE *AMICI*

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including nonfiction, biography, history and fiction.

The Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 218 magazine publishers who publish 846 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The *amici* both represent segments of the publishing industry, and accordingly, this brief will focus on the issues in this case of greatest relevance to publishers, as distinguished from other participants in the creation of First Amendment materials. The parties predominantly have focused their submissions on the allegations that Janet Malcolm, the writer, made a series of libelous statements by misquoting the plaintiff, and therefore the parties have dealt only briefly with the libel charges lodged against the magazine and book publisher of Malcolm's work. Accordingly, this *amicus* submission aims to examine in greater detail plaintiff's case against the two publishers and the standards that properly may be imposed upon publishers without unduly limiting the free flow of speech.

INTEREST OF THE *AMICI* AND SUMMARY OF ARGUMENT

Amici submit this brief in order to express their views, on behalf of their members, of the potentially devastating impact of an unduly broad-sweeping decision in this case upon the general development of libel law, a body of law under which their members function every day. Unfortunately, at the present juncture, legal process appears more to have obscured the facts of this case than to have laid them bare. As now framed, the case is focused upon the hypothetical conduct of Janet Malcolm—the courts having assumed, for the purposes of summary judgment, that her notes of some of Jeffrey Masson's remarks were "fabricated" and that several quotes in her article therefore are clumsy alterations of the words spoken by Masson as reflected on various audio tapes. This posture lends itself to grand pronouncements in a vacuum, pronouncements which the *amici* fear will lead to improper limitation of the free flow of speech in situations not presently before the Court.

The key question in this litigation has never been whether it is proper purposely to fabricate quotes. Janet Malcolm denies having deliberately altered the quotations at issue in any substantive way, and the editorial practices of *The New Yorker Magazine, Inc.* ("*The New Yorker*") and Alfred A. Knopf, Inc. ("Knopf"), as well as others in the industry, do not embrace the substantive alteration of quotes. *Amici* are opposed to the bald fabrication of quotes as a matter of journalistic practice; they condone only the minor and commonplace changes employed to make sentences more understandable and coherent, while preserving the speaker's meaning.

The propriety of altering quotes is, *amici* submit, not the relevant issue. The appropriate inquiry is to determine what evidence should be sufficient to sustain a libel action for allegedly inaccurate quotes in light of the impact of the applicable standard on the writer and the publisher in the daily practice of their craft. In various ways, the standards

advanced by plaintiff would force writers and publishers to be absolute guarantors of the accuracy of quotes—to be stone-cold positive about them—a burden which would unquestionably bring to a grinding halt the free flow of speech.

With respect to the two publishers, *The New Yorker* and Knopf, plaintiff falls far short of the evidence required under prevailing case law to uphold a finding of actual malice. Masson's argument regarding *The New Yorker* is essentially that, having learned in the context of a pre-publication fact-check of four minor and nondefamatory mistakes *unrelated to the alleged libels* in a very lengthy article by a respected writer, the magazine publisher must have had subjective doubts as to the accuracy of the unconnected passages at issue. Masson's proposed rule would essentially require that, once a handful of insignificant errors are discovered, a publisher would have to assume the role and responsibilities of the writer and re-check everything, from beginning to end, with the direct sources or source material. Plainly, this is an onerous burden which publishers could not sustain and which would severely contract the number of publications available to the public. Moreover, this would entail a dramatic change in long-standing, real world practice.

As for its claim against Knopf, plaintiff essentially argues that even the vaguest threat of a libel action necessitates substantial verification, even where the book publisher is merely reprinting a work of a known and reliable writer, which was previously published by a respected publisher. Critically, there is no evidence in the record of any *written* communication to either *The New Yorker* or Knopf stating that the articles were libelous, or any oral communication in which *specific* passages were identified as incorrect, after the articles were published and prior to the book's publication. Moreover, Masson's half-hearted threats came from an individual who was known from Malcolm's writings to be litigious and accusatory. In these circumstances, Knopf had no "obvious reasons" to suspect falsity, and thus its judgment to rely upon a respected writer and publisher rather than investigate

further cannot, as a matter of law, form the basis for liability.[1] As stated in an analogous case: "The threat of a libel suit by [plaintiff] might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources."[2] Masson himself makes the startling admission that, while Knopf knew of his accusations, Masson does not believe that the publisher believed his charges of inaccuracy to be true, but rather trusted Janet Malcolm. (J.A. 248).

In this context it is important to remember that publishers of substantial size often receive a steady stream of accusations of falsity or libel, almost always in situations where the information imparted is unflattering but, in fact, accurate. "If potential plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the first amendment policy embodied in *New York Times* would be undermined." *Martin Marietta Corp.* v. *Evening Star Newspaper*, 417 F. Supp. 947, 960 (D.D.C. 1976) (summary judgment granted to newspaper despite the fact that plaintiff informed newspaper that article was false in between printings of earlier and later editions).

The unusual hypothetical analysis in this case raises two further concerns for *amici*. First, it is absolutely critical that potential plaintiffs in future litigations not be able to thwart motions for summary judgment by authors and publishers based primarily on the facile allegation that an author's notes are fabricated. Were the simple, easy-to-make charge of fabrication, without more, sufficient to lead courts to treat an author's notes as a nullity, at best, almost every innocent author and publisher could be forced to endure the arduous burdens of trial. Moreover, the threat of such an allegation would be held over the collective heads of authors and pub-

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1 *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2696 (1989).

2 *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal.3d 244, 260, 690 P.2d 610, 620, 208 Cal. Rptr. 137, 147 (1984) (In Bank), *cert. denied*, 478 U.S. 1009 (1986).

lishers by many a subject seeking to squelch an unfavorable portrait—thus chilling many such publications. The principles of *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), dictate that a mere denial of the accuracy of notes should not be sufficient for a court to adopt the assumption of fabrication for purposes of summary judgment, and that plaintiffs must adduce additional evidence sufficient to establish that the notes are, in fact, fabricated.

Finally, *amici* encourage the Court to adopt the incremental harm analysis as applied by the Second Circuit in *Herbert* v. *Lando*, 781 F.2d 298, 310-12 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). Thus, "statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312. Plaintiff's acknowledged quotations are so colorful that the alleged embellishments essentially do no more than reinforce the prevalent themes in the article and are not so far from the "truth" as to be worthy of a libel judgment.

ARGUMENT

I.

PLAINTIFF HAS NOT MET HIS BURDEN OF SHOWING ACTUAL MALICE AS TO THE TWO PUBLISHERS

A. Introduction

The evidence gathered by plaintiff with respect to the actions of *The New Yorker* and Knopf falls far short of establishing the presence of constitutional malice under controlling case law. In cursory fashion, Masson argues that the two publishers proceeded in reckless disregard of the truth by failing to "take the time to review the tapes" despite the fact that, in the case of *The New Yorker*, it had knowledge of a few nondefamatory mistakes, and in the case of Knopf, it

had knowledge of a vague threat of a libel action. Brief for Petitioner ("Ptnr. Br.") at 21. Masson's sole authority for this proposition is an analogy to *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678 (1989) (hereinafter "*Harte-Hanks*"), which he claims holds that "such 'purposeful avoidance of the truth' would constitute actual malice." Ptnr. Br. at 21. The facts of *Harte-Hanks*, however, are radically different from those before the Court. *Harte-Hanks* reaffirms the long-standing principle that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." 109 S. Ct. at 2696. *Harte-Hanks* requires further investigation only where " 'there are *obvious reasons* to doubt the veracity' " of the informant or information. *Id.*, quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968) (emphasis added).

Courts rightfully have been leery of claims based on failure to investigate further, both because such decisions by publishers often are based on a natural division of labor and faith in the author, rather than subjective awareness of falsity, and because judicially imposed burdens on publishers of additional verification would narrow the sphere of information available to the public. A review of the applicable standards makes plain that Masson's claims against *The New Yorker* and Knopf should be dismissed, and that the standards Masson seeks to impose on publishers are unworkable and detrimental to a robust press.

B. The Prevailing Standards Require Subjective Awareness of Probable Falsity.

The First Amendment prohibits recovery for defamation unless a plaintiff proves with "convincing clarity" that a false "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964). To survive a motion for summary judgment, there must be clear and convincing evidence from which a reasonable jury might find

that actual malice had been shown with convincing clarity. *Anderson*, 477 U.S. at 257.

As emphasized in numerous opinions authored by this Court, "[t]he [actual malice] standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' " *Harte-Hanks*, 109 S. Ct. at 2696, quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). The inquiry is not whether a publisher has satisfied the standard of the reasonable or prudent publisher, but rather whether "the defendant *in fact* entertained serious doubts as to the truth of the publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) (emphasis added); *see also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974). The falsity must be "brought home to" the publisher. *New York Times Co.*, 376 U.S. at 287.[3]

Accordingly, a claim that a defendant failed to investigate before publishing is relevant only to the extent that it reflects on the subjective attitude of the publisher. *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal.3d 244, 690 P.2d 610, 619, 208 Cal. Rptr. 137, 145-46 (1984), *cert. denied*, 478 U.S. 1009 (1986).[4] As stated above, under *Harte-Hanks* and its predecessor cases, including *St. Amant*, failure to investigate further is probative of a subjective awareness of falsity only where " 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' " *Harte-Hanks*, 109 S. Ct. at 2696, quoting *St. Amant*, 390 U.S. at

3 The Court has adopted a subjective standard even though some erroneous publications thereby may receive protection, in recognition of the fact that "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *St. Amant*, 390 U.S. at 731-32.

4 *See also New York Times Co.*, 376 U.S. at 263, 287 (no actual malice even where information demonstrating falsity of the allegations available in the *Times'* own files, since editorial staff was unaware of these articles).

732. There must be clear and convincing evidence that the defendant's "inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source's] charges." *Harte-Hanks*, 109 S. Ct. at 2698.[5]

C. No Liability May Be Imposed Upon *The New Yorker*.

1. The Discovery Of A Few Minor Errors During Fact-Checking Does Not Lead To A Duty To Investigate Further, Including Any Obligation To Verify Quotes.

The uncontroverted record evidence indicates that, even assuming for the sake of argument that Malcolm altered quotations and that such alterations were defamatory, *The New Yorker* did not know that the specific quotations were false, or act with reckless disregard as to their particular truth or falsity. *The New Yorker* relied on a writer with an outstanding reputation, followed its ordinary procedures in verifying facts contained in the article, had no reason to suspect that the article contained any defamatory material, and had no indication that the alleged libelous statements in particular might be inaccurate.

The New Yorker was entirely justified in relying on the work of Malcolm, a well-respected, reliable author. At the time the article was published, Malcolm had been a professional journalist for almost 20 years, writing primarily for *The New Yorker*. She also had written for *The New Republic*, *The Nation*, and the *New York Review of Books*.

5 Other courts, such as the District of Columbia Circuit, have articulated similar standards: "[A] rule requiring verification in the absence of evidence that the publisher had *good reason to suspect falsity* would curtail substantially a protected form of speech." *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 972-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (emphasis added); *see also Weiner* v. *Doubleday & Co.*, 74 N.Y.2d 586, 595, 549 N.E.2d 453, 457, 550 N.Y.S.2d 251, 255 (1989), *cert. denied*, 110 S. Ct. 2168 (1990) ("without '*substantial reasons*' to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer.") (emphasis added).

Malcolm had prior expertise in writing about psychoanalysis, the subject at issue in the article, having previously published a two-part article on the profession in *The New Yorker*, which later became a book published by Knopf. (J.A. 47). Moreover, *The New Yorker* editors were aware that Malcolm had conducted extensive recorded interview sessions with Masson. (J.A. 223).

Reliance on the professional reputation of an author is a strong factor in defeating an allegation of actual malice. *See, e.g., Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Reader's Digest Ass'n*, 690 P.2d at 619, 208 Cal.Rptr. at 146; *Weiner* v. *Doubleday & Co.*, 74 N.Y.2d 586, 595, 549 N.E.2d 453, 459, 550 N.Y.S.2d 251, 255 (1989) ("without 'substantial reasons' to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer"); *Martin Marietta Corp.*, 417 F. Supp. at 959 (newspaper entitled to rely on reporter "of proven reliability").[6]

The New Yorker also followed its customary fact-checking procedure. Specifically, a *New Yorker* fact-checker undertook to check the reviewable facts contained in the article, including, as is *New Yorker* policy, facts contained within quotations, although not the words of the quotes themselves. To its credit, *The New Yorker* devotes significant resources to fact-checking and, indeed, is known to have "set a kind of standard for factual accuracy." *See Masson* v. *The New Yorker Magazine, Inc.*, 895 F.2d 1535, 1569 (9th Cir. 1989) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

Masson bases his libel arguments on a conversation between Masson and a *New Yorker* fact-checker prior to publication of the article during which Masson identified four alleged errors. Ptnr. Br. at 47; J.A. 66-67. In addition, Masson claims that *The New Yorker* declined to accede to a request he made in that conversation that all quotes be verified with him. Ptnr. Br. at 47; J.A. 66-67. *The New Yorker* unequivocally denies that Masson asked that all quotes be verified with him. (J.A. 247).

6 As in *Marcone*, publishers are permitted to place considerable reliance on a contributor even where the individual is a free-lance writer who has had only limited contact with the publisher. 754 F.2d at 1089. In comparison, *The New Yorker* clearly was entitled to rely on Malcolm, a long-time contributor of proven reliability.

Masson's allegations are not probative of actual malice. None of the alleged errors that Masson identified were related in any way to the alleged defamatory quotations at issue; none were defamatory; and all were insignificant errors unrelated to the central points of the article. At least one of the alleged errors was not even incorrect. Masson charges that he was asked to verify that his ex-wife is "Polish," and had to inform the fact-checker that she is, in fact, "a Jew from Poland." (J.A. 66). The addition of the woman's religion, while more complete, does not render incorrect the statement of her nationality.[7]

The fact that *The New Yorker* was notified during a responsible pre-publication fact-check of four insignificant inaccuracies, completely unrelated to the alleged libelous statements, in a 48,500 word publication does not show in the slightest that the *alleged libelous statements* were published with any subjective doubt with regard to their truth—much less "serious doubts." *St. Amant*, 390 U.S. at 731. Plaintiff's attempt to leap from knowledge of four minor nondefamatory errors to subjective doubt about the entire article is unsupported by prevailing case law. On the contrary, such "isolated instances of inaccuracy . . . cannot be accorded significance, since the relevant rule of law contemplates that 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive.' " *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 971-72 (D.C.

7 The other three alleged errors to which Masson alerted *The New Yorker* during his conversation with the fact-checker were: 1) that Masson had not gotten his ex-wife interested in psychoanalysis, but rather that she was in analysis when Masson met her; 2) that his father was not from Bessarabia, but rather Bukhara; and 3) that Dr. Eissler did not return Masson's letters unopened. (J.A. 66-67).

Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (hereinafter "*Keogh*"), quoting *Garrison*, 379 U.S. at 74. Only in instances of "persistent inaccuracy" does a publisher have reason to be suspicious. *Martin Marietta Corp.*, 417 F. Supp. at 959-60, citing *Keogh*, 365 F.2d at 971.

Moreover, there was nothing "inherently improbable" in the alleged libelous quotations. *St. Amant*, 390 U.S. at 732. Rather, there was no reason for *The New Yorker* to harbor any suspicions where, as here, the alleged misquotations were completely consistent with the general tenor of the article.

The fact that *The New Yorker* declined to verify all quotes with Masson, as allegedly requested, is also not probative of actual malice. Absent persistent inaccuracy, and thus an obvious reason to be suspect, *The New Yorker* was under no obligation to verify the quotes. *St. Amant*, 390 U.S. at 732-33. Moreover, *The New Yorker* was acting in conformity with its customary policy not to verify the accuracy of the precise words—as opposed to the facts—contained in each quotation. This policy is completely supportable. Verification of the precise words of each quote would involve an enormous expenditure of time and money. Even if attempted, it would be virtually impossible to verify quotations with speakers, who are unlikely to recall the precise words spoken in an earlier conversation. Moreover, speakers undoubtedly would be tempted to deny quotations that place the speaker in an unfavorable light.

As plaintiff would have it, any time a publisher were to find a few mistakes, the publisher would be obligated to retrace all of the author's research, regardless of the length of the article or the insignificance of the inaccuracy. In urging this onerous standard, plaintiff ignores the realities of the publishing industry—whether book, magazine or newspaper. Publishers simply cannot sustain the significant financial burden which would result from the necessity extensively to fact-check the vast quantities of materials which would require verification under plaintiff's proposed standard. As the D.C.

Circuit has stated in language applicable to magazine and book publishers:

> Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material.

Keogh, 365 F.2d at 972.

Ironically, the imposition of a duty to check all facts and quotes upon learning of insignificant inaccuracies would lead publishers not to check manuscripts at all. *See Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) ("The appellees would punish the *Times* for its effort to confirm the story, apparently maintaining that a little prudence is a dangerous thing"). There is no convincing, realistic basis to impose further responsibilities of verification after the discovery of minor errors, where this Court did not even require the *New York Times* in *New York Times Co.* v. *Sullivan* to check its own files, which contained the *Times'* own published articles demonstrating the falsity of the allegation asserted. *See New York Times Co.*, 376 U.S. at 263; *see also Keogh*, 365 F.2d at 972.

2. This Case Is Disposed Of By Case Law Indicating That Quotations Do Not Have To Be Reviewed With An Interviewee And Is Readily Distinguishable From *Harte-Hanks*.

Well-established case law specifically supports *The New Yorker's* position that a publisher is not obligated to review or verify a publication with the subject of the publication. *St. Amant*, 390 U.S. at 730; *Reader's Digest Ass'n*, 37 Cal.3d at 259, 690 P.2d at 619, 208 Cal.Rptr. at 146. A plaintiff cannot prove actual malice merely by asserting that a publisher

failed to contact the subject of his work or verify the subject's statements. *St. Amant*, 390 U.S. at 730; *Davis* v. *Costa-Gravas*, 654 F. Supp. 653, 657 (S.D.N.Y. 1987); *Loeb* v. *New Times Communications Corp.*, 497 F. Supp. 85, 92-93 (S.D.N.Y. 1980). In a case dealing with the very issue presented here, *James* v. *Gannett Co.*, 40 N.Y.2d 415, 423, 353 N.E.2d 834, 840, 386 N.Y.S.2d 871, 877 (1976), the New York Court of Appeals considered whether actual malice existed where the plaintiff alleged that she had been misquoted and the reporter and defendant newspaper had " 'deliberately refused to allow plaintiff to review said article and pictures.' " The court rejected the plaintiff's argument and stated:

> A requirement that persons mentioned in proposed newspaper accounts or articles be permitted a first instance, prepublication review, including a review of direct quotations, would, in effect, impose the equivalent of censorship traditionally anathema in our society. Outsiders have no right to sit in the editor's chair; to insist that an interviewee should be assured an opportunity with the benefit of reflection and hindsight to revise spontaneous statements would be equally to strike at the vitality of news reporting.

James, 40 N.Y.2d at 423-24, 353 N.E.2d at 840, 386 N.Y.S.2d at 877. The court soundly rejected the suggestion that a refusal to verify quotations and other facts with a plaintiff evidences actual malice:

> Publications establish their own method of verifying information and the fact that the subject of an article was not offered, prior to publication, an opportunity for review and comment does not, by itself, establish that the publisher acted maliciously or recklessly. Only where the publisher has, or should have had, reasons to doubt the accuracy of the report or its reporter is there a legal duty to make further inquiry . . . . In other words, it must be established that there were obvious reasons to doubt the veracity of the report.

James, 40 N.Y.2d at 424, 353 N.E.2d at 841, 386 N.Y.S.2d at 877. Plaintiff cites no authority to the contrary.

Plaintiff's effort to squeeze within the rubric of *Harte-Hanks* and argue that "Malcolm's publishers were guilty of 'purposeful avoidance of the truth' " is unavailing. Ptnr. Br. at 47, quoting *Harte-Hanks*, 109 S. Ct. at 2698. The sharply contrasting facts of *Harte-Hanks*, as compared with the case at bar, demonstrate soundly that *The New Yorker's* conduct does not qualify as the type of willful blindness that *Harte-Hanks* sought to address.

The plaintiff in *Harte-Hanks*, a candidate for a municipal judgeship, charged that the defendant newspaper purposely avoided learning whether, as was reported, he in fact offered inducements to two citizens to provide information about the alleged bribery of a member of the incumbent judge's staff. This Court affirmed a jury verdict for the plaintiff, finding that several pieces of evidence, considered cumulatively, provided clear and convincing evidence of actual malice. The evidence included: 1) the newspaper's choice "not to interview the one witness who was most likely to confirm" the reported incident, despite the fact that six other witnesses denied the reported charges; 2) the newspaper's decision not to listen to four hours of audio tapes of the actual conversation in which plaintiff was alleged to have committed his wrongful acts; 3) the newspaper's earlier editorial foreshadowing the charges which could "be taken to indicate that [the editor] had already decided to publish [the] allegations, regardless of how the evidence developed"; and 4) a finding that the most serious charge was "highly improbable," and inconsistent with other undisputed facts. *Harte-Hanks*, 109 S. Ct. at 2693-94, 2697.

The facts of this case bear no resemblance to those in *Harte-Hanks*. The reporters in *Harte-Hanks* failed to attempt to contact the key player alleged to have been offered the inducements, relying instead on her sister's version of the incident which was contradicted by six other witnesses. Here, Malcolm had indeed spoken to Masson, and there were no

conflicting accounts of a central event for the magazine to sort out. In fact, there had been no indication at all that the quotations now alleged to be fabricated were inaccurate.

In this context, the tapes in *Harte-Hanks* provided an obvious means substantially to resolve the conflicting accounts of the incident the reporters had gathered. The tape was in effect the newspaper's entree into an event at which none of its reporters was present. By contrast, the tapes at issue here are a reporter's own tapes of her own interviews. *The New Yorker* would only be referring to them as a means of double-checking and duplicating the work of a respected writer, not as a source of new information.

Additionally, the newspaper in *Harte-Hanks* was adjudged reckless for failing to solicit the most basic of information from the key witness, not for failing to verify the precise words used during many hours of conversation. Of note, the tapes in *Harte-Hanks* spanned four hours, while Malcolm's tapes span between 40-50 hours. Verifying the Masson quotes against the tapes would have been an absolutely enormous undertaking, which likely would have consumed at least two or three times the hours of the tapes themselves.

Viewing the facts as a whole, this Court concluded in *Harte-Hanks* that "the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source's] charges." 109 S. Ct. at 2698. *The New Yorker* cannot logically be viewed as seeking to avoid the truth pertaining to the alleged libels when it had *no* knowledge of any conflicting version or viewpoint with regard to those statements. Moreover, any such inference of purposeful avoidance of the truth is specifically negated by the fact that *The New Yorker* acted in conformity with its customary policy of checking facts, but not verifying the precise words, contained in quotes. In sum, the application of *Harte-Hanks* to the case at bar would entail a radical extension of that case, which would significantly impair the free flow of speech.

3. A Publisher Known For Accuracy Cannot Be Held To A Higher Standard Under The Subjective Test Of Actual Malice.

In his dissenting opinion below, Judge Kozinski espouses the erroneous and harmful theory that *The New Yorker* should be judged by a higher-than-customary standard since it commits substantial resources to fact-checking and therefore is well-known for factual accuracy. The dissent reasons that by giving assurances of its accuracy to the reading public, "*The New Yorker* has induced a reasonable expectation of accuracy in the minds of sources and readers," thus encouraging sources to speak without reservation and readers to "accept at face value the quotes they read in *New Yorker* articles." 895 F.2d at 1569.

This theory conflicts with the clear direction of this Court, discussed above, that the actual malice test focuses upon subjective state of mind, not objective standards, whether self-created or judicially imposed. The dissent would not have a judge or jury consider whether *The New Yorker* in fact entertained serious doubts as to the truth of a statement, but rather whether *The New Yorker*, a publication with a stellar reputation for accuracy, should have known that a particular statement was false. No support is given for this novel theory.

Nor does the dissent attempt to justify the disincentive for publishers to maintain high standards of accuracy which necessarily would result from its proposed analysis. Very simply, a publisher will not be eager to earn a reputation for reliability and accuracy if it knows that its efforts will work against it in a libel suit. Under the dissent's theory, hard work, responsibility and extra care would be punished, not rewarded, as they should be. This Court should send a clear message rejecting the reasoning espoused by the dissent below.

4. The Undisputed Evidence Demonstrates That *The New Yorker* Is Not Vicariously Liable For Malcolm's Actions.

As a last resort, Masson suggests that *The New Yorker* should be held vicariously liable for Malcolm's actions "[t]o the extent [she] can be considered an employee of *The New Yorker*." Ptnr. Br. at 47.[8] The undisputed facts, however, do not render Malcolm an employee under the doctrine of *respondeat superior*, and, as a matter of law, preclude a finding of vicarious liability. For example, as with the article at issue, Malcolm suggests articles which *The New Yorker* editors are free to reject, and is paid only at the completion of the work. (J.A. 244-45). She is not required to spend any amount of time working for *The New Yorker*, nor is she required to write anything for *The New Yorker*. The determination as to what, if anything, she writes, is solely hers, and the amount she is paid per article varies. (J.A. 245-246).

The test for imposing vicarious liability is whether the agent or employee is subject to the control of the principal or employer. *See Hunt* v. *Liberty Lobby*, 720 F.2d 631, 649 (11th Cir. 1983). This element of control is missing here. Plaintiff cites no case where the tenuous relationship between a writer and a publisher evidenced here resulted in an imposition of liability on the publisher. The prevailing case law is to the contrary.[9]

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8 Of course, as the district court held, *The New Yorker* cannot be held vicariously liable where the actions of Janet Malcolm, the alleged "employee," do not support a reasonable jury finding of actual malice.

9 *See, e.g., Martin Marietta Corp.*, 417 F. Supp. at 961 (newspaper not liable for actions of third party news service writer even where newspaper editor gave specifications for the article, permitted use of the newspaper's library and files for research, and compensated writer for the article).

D. No Liability May Be Imposed Upon Knopf.

With respect to the book publisher Knopf, plaintiff's claim is premised upon the insupportable argument that publishers are required to engage in substantial verification every time they receive a vague threat of a libel action—or else be guilty of "purposeful avoidance of the truth." *Harte-Hanks*, 109 S. Ct. at 2698. This is directly contrary to prevailing law and is especially inappropriate where, as here, the publisher merely was republishing an article written by a reliable author and previously reviewed by a respected publisher. As detailed below, Masson's vague and half-hearted indications of inaccuracies did not provide "obvious reasons" for Knopf to suspect falsity, and thus an obligation to investigate further. *St. Amant*, 390 U.S. at 732.

1. Knopf Placed Justifiable Reliance On A Respected Author and Publisher.

Knopf's reliance on two layers of reputable sources in the chain of publication strongly negates a claim of actual malice. Like *The New Yorker*, Knopf was entitled to rely on the strong reputation of Malcolm. Knopf also placed justifiable reliance on the equally strong reputation of *The New Yorker* for accuracy and on *The New Yorker* fact-checkers that reviewed the article before it was republished by Knopf. Similar factors were highlighted in *Herbert* v. *Lando*, 781 F.2d at 309 n.7: "Particularly relevant to the state of mind of the [magazine] editors in publishing the article was their knowledge that CBS had already determined the substance of Lando's report fit for publication."

In circumstances of republication in particular, the imposition upon publishers of a duty to verify is economically unrealistic and a true barrier to First Amendment freedoms. As the First Circuit has stated in this context:

> To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of nonfiction works beyond the resources of the average man. This result would, we think, pro-

> duce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid.

Geiger v. *Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983); *see also Weiner*, 74 N.Y.2d at 595, 549 N.E.2d at 457, 550 N.Y.S.2d at 255.

2. Masson's Vague Denial of Accuracy Created No Reason to Suspect Falsity.

Plaintiff's central argument is that Knopf harbored a high degree of awareness of probable falsity because it knew before publication of the book that plaintiff's lawyer had called *The New Yorker* to complain about inaccuracies in the article, and that Knopf's failure to verify the manuscript against the tapes therefore constituted willful blindness, and hence actual malice. Ptnr. Br. at 47; J.A. 224. Absent "obvious reasons" to suspect falsity, Knopf was under no obligation to investigate further. *St. Amant*, 390 U.S. at 732; *Reader's Digest Ass'n*, 37 Cal.3d at 258, 690 P.2d at 619, 208 Cal.Rptr. at 146. Under prevailing case law, the described phone call—which is the functional equivalent of a denial—in no way rises to the level of providing such "obvious reasons" as to suspect falsity. Of particular relevance, there is no record evidence that there was any mention in the telephone call of any specific complaints regarding particular quotations in the article. Nor is there any evidence that Masson regarded the issue seriously enough to send a written communication to *The New Yorker* or to Knopf in the several months between publication of the article and the book formally advising them of any alleged libel.

Such general denials of accuracy cannot create a duty for the publisher to investigate. As then-Circuit Judge Scalia, writing for the D.C. Circuit, ruled in the context of a letter received before publication alleging falsity, only disregard for *specific verifiable facts* contradicting the anticipated publication at issue suffices to indicate potential actual malice:

> [T]he letter as described could not conceivably constitute, in and of itself, sufficient evidence of malice to

> overcome a summary judgment motion. That effect might be achieved by a prior notice citing specific, verifiable facts contradicting the allegations so directly as to cause any reasonable person to conduct further inquiry; but mere general allegations of falsity similar to those contained in the complaint do not suffice.

Liberty Lobby, Inc. v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). Similarly in *Martin Marietta Corp.*, 417 F. Supp. at 960, where the plaintiff telephoned to accuse the newspaper of a false and defamatory publication after the first, but before the later, press runs, the court emphasized the "lack of detail provided in the denial" in determining that no actual malice existed with respect to any of the printings.

Further, a publisher can consider a plaintiff's litigious nature in deciding how much, if any, credibility to accord a plaintiff's complaints. *See Reader's Digest Ass'n*, 37 Cal.3d at 260, 690 P.2d at 620, 208 Cal.Rptr. at 147 (defendant's awareness that plaintiff's "legal department often used the courts to silence articles" weighs in favor of its discounting of plaintiff's warning). Here, plaintiff had sued his former colleague Dr. Eissler for libel—a fact contained in Malcolm's manuscript. (*See* J.A. 268-78). Moreover, Knopf knew from the manuscript of Masson's obstreperous and accusatory personality.

Finally, the very commonplace occurrence of denials and threats of libel litigation—and thus their diminished impact—has been acknowledged by this Court. The Court has relieved authors and publishers from a duty to accept " 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.' " *Harte-Hanks*, 109 S.Ct at 2698, n.37 (quoting *Edwards*, 556 F.2d at 121). Thus, "[t]he threat of a libel suit . . . might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources." *Reader's Digest Ass'n*, 37 Cal.3d at 260, 690

P.2d at 620, 208 Cal.Rptr. at 147. *See also Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 952, *cert. denied*, 434 U.S. 969 (1977) ("That the articles drew criticism when originally published did not preclude a responsible publishing house from reprinting them.").

Given the very commonplace nature of vague threats of libel and broad denials of accuracy, a judicially-imposed burden of verification upon receiving such protests would impose enormous obstacles to the publication process and significantly diminish the volume and variety of materials which could be published. *See Curran* v. *Philadelphia Newspapers, Inc.*, 497 Pa. 163, 180, 439 A.2d 652, 660 (1981); *Martin Marietta Corp.*, 417 F. Supp. at 960.

Finally, in the instant case, Masson should be precluded from arguing as a litigation posture that Knopf in fact entertained doubts as to the truth of the alleged libelous statements when Masson himself stated at his deposition: "No, certainly I don't believe Mr. Gotlieb [sic] [Knopf's president], if he knew that they were false, would have gone ahead and published it. I think he was negligent in not finding out, but not dishonest." (J.A. 248).

II.

A MERE DENIAL OF THE AUTHENTICITY OF A WRITER'S NOTES SHOULD NOT BE SUFFICIENT FOR A COURT TO ASSUME FABRICATION

Two aspects of the decisions below, while couched in reference to Malcolm, have broad effect on all participants in the publishing process. First, a plaintiff's mere denial of the authenticity of a reporter's notes should not be sufficient for a court to assume fabrication under prevailing case law governing summary judgment. Rather, a plaintiff must adduce additional evidence sufficient to show that the notes are, in fact, fabricated. The decisions of the courts below, which fail to pursue a detailed analysis as to whether Masson made an

adequate showing, invite potential plaintiffs in future litigations to defeat summary judgment by making the all-too-facile charge that the author manufactured the notes. Very often writers have only handwritten notes, and no tape-recording. Were courts generally to adopt the near automatic acceptance of a plaintiff's allegation of fabrication as a disputed issue of fact, writers and publishers could be made to endure full-blown jury trials in each and every case where a writer relied upon notes. Moreover, the subjects of unfavorable portraits would easily be able to chill such publications with the mere threat of a charge of fabrication, since such a charge would result in a long and arduous trial. The Court did not intend such results in its recent pronouncements on summary judgment.

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), the Court stated: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . ." Similarly, *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 256 (1986), made clear that a plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial . . . of legal malice." The plaintiff must present "affirmative evidence" to defeat the motion. *Anderson*, 477 U.S. at 257. Only "justifiable" inferences are to be drawn in the plaintiff's favor. *Anderson*, 477 U.S. at 255. Accordingly, lower courts should engage in a meaningful case-by-case analysis to determine if sufficient evidence exists to suggest that the defendant's evidence is not to be believed, and, more particularly, to determine if notes are, in fact, fabricated.

Civil, as well as constitutional, notions support the concept that mere allegations of fabrication should be insufficient and that the courts should carefully examine the evidence proffered. A charge of fabrication of notes is analogous to a charge of common law fraud, and under the Federal Rules of Civil Procedure, in all averments of fraud, "the circum-

stances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). Without these threshold requirements, allegations of fraud or fabrication are simply too easy to make. The impetus behind Rule 9(b) applies in full force in this case.

III.

THE COURT SHOULD ADOPT THE INCREMENTAL HARM ANALYSIS AS OUTLINED IN *HERBERT* v. *LANDO*

Finally, *amici* encourage the Court to adopt the incremental harm analysis as applied by the Second Circuit in *Herbert* v. *Lando*, 781 F.2d at 309-12, which may be employed as a basis for affirming the Ninth Circuit's findings with regard to several quotes. The Second Circuit's holding that "statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery," 781 F.2d at 312, makes eminent good sense. In essence, a plaintiff should not be able to "nab" a publisher on a technicality when the "big picture" accurately reflects the state of affairs—as the Second Circuit aptly coined it, "a classic case of the tail wagging the dog." *Id*. The incremental harm analysis of *Herbert* is merely a logical outgrowth of the well-established notion that a court should look for substantial falsity—that is, it should examine a publication in its entirety, rather than sentences in isolation. While publishers plainly should not be granted the license to spin out fictional anecdotes or made-up remarks once a subject has displayed a certain proclivity, the carefully tailored test in *Herbert* renders highly unlikely that authors and publishers will consciously resort to fabrications. It also precludes damage awards only where no substantial harm

beyond that occasioned by the accurate materials has occurred.[10]

This case presents a situation where plaintiff's acknowledged quotations are so colorful that the alleged embellishments predominantly reinforce the prevalent themes in the article and are not so far from the "truth" as to be worthy of a libel judgment. Thus, considering the admittedly accurate statements made by Masson, the "intellectual gigolo" quote, for example, "impl[ies] the same view, and [is] simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312. Here, as in *Herbert*, any inferences that can be drawn from the "intellectual gigolo" and other quotes can equally be drawn from Masson's undisputed statements. *Herbert*, 781 F.2d at 312. Accordingly, the alleged misquotations should not be actionable.

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10 The D.C. Circuit's opinion in *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986), does not present a barrier to adoption of the *Herbert* standard. There, the court expressly stated that the defamatory statements at issue were *not* subsidiary to the non-actionable statements, but rather were statements further attacking the reputation of the plaintiff by creating inferences "quite separate and distinct from" inferences that were not actionable. *Liberty Lobby*, 746 F.2d at 1568, n.6. Neither of the California cases cited by plaintiffs addresses the propriety of an incremental harm analysis. Pltnr. Br. at 50. *Washburn* v. *Wright*, 261 Cal. App. 2d 789, 795, 68 Cal.Rptr. 224, 228 (1968), only establishes the unsurprising proposition that "a single sentence may be the basis for an action in libel even though buried in a much longer text." The other California case, *Baker* v. *Los Angeles Herald Examiner*, 42 Cal.3d 254, 261, 721 P.2d 87, 91, 228 Cal.Rptr. 206, 209 (1986), *cert. denied*, 107 S. Ct. 880 (1987), is similarly inapposite, and merely discusses the commonplace notion that a court should consider a publication "in its entirety."

CONCLUSION

For the reasons set forth above, the *amici* respectfully request that the decision below granting defendants' motion for summary judgment be affirmed.

Respectfully Submitted,

ROBERT G. SUGARMAN*
R. BRUCE RICH
LINDA STEINMAN
RONALD KLEMPNER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Amici Curiae
Association of American Publishers, Inc. and Magazine Publishers of America, Inc.

Of Counsel:

Tina A. Ravitz
Slade R. Metcalf
Laura R. Handman
Magazine Publishers of America, Inc.

*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,
Petitioner,
v.
THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE TIME INC. MAGAZINE COMPANY, AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, THE AUTHORS GUILD, INC., THE POINT REYES (CALIFORNIA) LIGHT, COLLEGE MEDIA ADVISERS, INC., STUDENT PRESS LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, NEWSLETTER ASSOCIATION, EDMUND MORRIS AND DAVID McCULLOUGH

Of Counsel:
HARRY M. JOHNSTON, III
The Time Inc. Magazine Company
Time & Life Building, 17th Floor
Rockefeller Center
New York, New York 10020

ROSLYN A. MAZER
(Counsel of Record)
PAUL R. TASKIER
MELINDA C. BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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RICHARD M. SCHMIDT, JR.
N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
Attorneys for
The American Society
of Newspaper Editors

CHARLES S. SIMS
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
Attorneys for The American
Civil Liberties Union

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

LEE LEVINE
JAMES E. GROSSBERG
ROSS, DIXON & MASBACK
555 - 13th Street, N.W.
Suite 1300E
Washington, D.C. 20004
Attorneys for
The Newsletter
Association

MARK GOODMAN
Student Press Law Center
1735 Eye Street, N.W.
Suite 504
Washington, D.C. 20006

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This brief is respectfully submitted, with the consent of the parties, pursuant to Rule 36.2 of the Rules of this Court, urging affirmance of the decision below.

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of eleven *amici curiae*: The Time Inc. Magazine Company, American Society of Newspaper Editors, National Association of Broadcasters, The Authors Guild, Inc., *The Point Reyes* (Califor-

nia) *Light*, College Media Advisers, Inc., Student Press Law Center, American Civil Liberties Union, Newsletter Association, Edmund Morris and David McCullough. Each of the *amici* is more fully described in the Appendix hereto.

Amici consider this case to be of critical significance in preserving constitutional protection for the publication of words attributed to public officials and public figures in newspapers, magazines, television and radio broadcasts, works of biography and history, and other nonfiction works. *Amici* urge that reporting on the words of public figures should continue to be subject to the same legal standard as reporting on their deeds.

Amici disapprove of deliberate alteration or fabrication of quotes.

INTRODUCTION AND SUMMARY OF ARGUMENT

A public figure who eagerly submitted himself to over 40 hours of tape-recorded interviews and many hours of untaped interviews and conversations did not like the way he was quoted in a few passages published by respondents. He filed a libel and invasion of privacy complaint expressly denying having made certain statements attributed to him in quotation marks. He withdrew his initial complaint, however, after transcripts of the tape-recorded conversations showed that three of the challenged statements were quoted verbatim. Three other complaints were pursued, some of which continued to challenge quotations later found to be taken virtually verbatim from tape-recorded conversations. Following the district court's dismissal of these portions of the amended complaints (for failure to establish falsity), petitioner charged respondents, in his Fourth Amended Complaint, with defaming him in a few passages which were not recorded on tape in the exact words attributed to him in two lengthy magazine articles and a subsequently published book.

I. Libel suits controlled by the actual malice rule often present themselves at summary judgment in a posture where plaintiffs resist the defendants' motion on the ground that there is sufficient evidence for a jury to find actual malice by clear and convincing evidence. As carefully administered by this Court to encourage the breathing room necessary to foster the principles underlying the First Amendment, the fault standard in public figure libel has focused since *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), on whether the writer or publisher had a "high degree of awareness of . . . probable falsity." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). Unless the defendant "in fact entertained serious doubts as to the truth of his publication," even the erroneous publication is protected by the First Amendment. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). In this case, a writer drew upon many hours of interviews and conversation, most of them taped, and published a lengthy account of a complex controversy. As many journalists, biographers and other writers commonly do, she drew upon a considerable volume of notes and tapes, as well as her memory, and placed in quotations many thousands of words.

We urge in Part I that the Court reject petitioner's claim that respondents' alleged departures from journalistic standards "will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment." Brief for Petitioner ("Pet. Br.") 24. As this Court has stated, "there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2685 (1989). We show further that the issues of "actual malice" and "substantial truth" are necessarily intertwined in a libel suit arising from assertedly defama-

tory quotations, and that recognition of this fact was central to the ruling of the court below that unless public figure libel plaintiffs can demonstrate by clear and convincing evidence that the publishers of a quotation in fact understood they were constructing a defamatory falsehood or had a "high degree of awareness of . . . probable falsity," *Garrison* v. *Louisiana*, 379 U.S. at 74, they cannot create a jury issue on actual malice in a libel suit arising from an allegedly defamatory quotation.

II. As this Court recognized in *Time, Inc.* v. *Pape*, 401 U.S. 279, 285 (1971), "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." The types of decisions made in capturing, recording and publishing quotations fall squarely within existing First Amendment doctrine protecting such conduct from the constitutional hazard of a jury verdict on the actual malice issue. As the empirical studies and other material we present in Part II show, when journalists, biographers and other writers publish the remarks of public figures, they face many choices due to a host of practical, technological and other factors. They face, as well, the consequences of human fallibility. Such factors have nothing to do with the writer's or publisher's subjective attitude toward the truth or falsity of published statements. Empirical studies show that discrepancies in words attributed to public figures generally do not change the meaning or context of the words. As further elaborated in Part II, good journalism and good law have lived together when it comes to analyzing allegedly defamatory remarks which are published in the form of quotations. Further, because the law of defamation redresses injury to reputation, there is no principled basis for distinguishing the fault standard for defamatory assertions about what a public figure *did* and similarly hurtful assertions about what a public figure *said*.

III. The challenges petitioner has made to the statements at issue fall into two categories: remarks that were edited in an allegedly misleading fashion and remarks placed in quotations which he denies having made in the precise words attributed to him. The mere fact that petitioner denies having made certain statements should not place a greater burden on respondents to negate malice under Fed. R. Civ. P. 56(e), any more than would his denial of any statement of historical fact. *See Pape*, 401 U.S. at 290. Had respondents paraphrased the same remarks or accused petitioner of other, allegedly defamatory facts, he would bear the same burden under *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986), to produce evidence which "could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." We show in Part III that the court below correctly applied existing doctrine under the First Amendment to reach the conclusion that petitioner did not meet his burden of showing respondents' knowledge of falsity or their reckless disregard of truth as to any of the statements.

ARGUMENT

I. THIS COURT HAS REFUSED TO PRESCRIBE JOURNALISTIC STANDARDS IN ITS ENFORCEMENT OF THE ACTUAL MALICE RULE

A. The Fault Standard In Public Figure Libel Focuses On The Defendant's Subjective State Of Mind

The interplay between the clear and convincing evidence standard of the "actual malice" rule defined in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and the parties' respective burdens in prosecuting and opposing motions for summary judgment under Fed. R. Civ. P. 56 was resolved in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In determining whether public officials or public figures have met their burden to create a genuine issue of material fact in resisting a summary judgment motion on the actual malice question, the Court ruled:

> the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. [*Id.* at 255-56.]

It is insufficient under *Anderson* merely to assert "that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice," *id.* at 256; rather,

> a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. [*Id.* at 254.]

Of the twelve public figure libel cases which have previously come before this Court where application of the *New York Times* actual malice rule was dispositive in cases involving false factual assertions, all but one involved allegedly defamatory allegations about what someone *did*.[1] *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-86

[1] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (allegations in advertisement by civil rights advocates accusing Montgomery, Alabama police officials of using repressive tactics toward demonstrators); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (district attorney accused eight judges of official misconduct); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (college athletic director charged of conspiring to "fix" a 1962 college football game); *Associated Press* v. *Walker*, 388 U.S. 130 (1967) (wire report stating that political activist had led the charge against federal marshals sent to enforce court desegregation decree and had urged rioters to use violent measures); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967) (per curiam) (newspaper editorials accusing candidate for court clerk of official misconduct); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (accusation that deputy sheriff was implicated in illegalities, including corruption, in the sheriff's office); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971) (losing candidate for U.S. Senate accused of having been a "bootlegger"); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (television segment challenging the bona fides of a U.S. Army general's allegations of atrocities during the Vietnam war); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (critical review of the sound quality of plaintiff's loudspeaker system focusing on whether the sound of musical instruments as heard through plaintiff's loudspeaker system tended to wander "about the room"); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (magazine articles accusing self-described "citizens' lobby" of neo-Nazi, anti-Semitic, racist and fascist activities); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678 (1989) (candidate for a municipal court judgeship accused of using "dirty tricks" and offering grand jury witness and her sister jobs and a free trip "in appreciation" for their help in the investigation).

(1971), and this case, involve allegedly defamatory allegations about what someone *said*. As this Court recognized in *Pape*, *id.* at 286, "[t]he question of the 'truth' of such an indirect newspaper report presents rather complicated problems."

Petitioner disregards the core constitutional principle that the defendant must entertain subjective doubts about the truth of the publication. He argues that "a jury could infer knowing falsity *solely* from the objective evidence that Malcolm attributed words to Masson that he did not say." Pet. Br. 43 (emphasis added). Alleged falsehoods in other contexts have never been held to such a standard; indeed, in *St. Amant* v. *Thompson*, 390 U.S. 727, 733 (1968), the Court applied the subjective standard of *New York Times*, 376 U.S. at 287-88, when it ruled that a falsehood arising from "[f]ailure to investigate does not *in itself* establish bad faith." (Emphasis added.) When assessing the evidence of actual malice as to statements about what public figures have allegedly done, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* at 731. Rather, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*

Absent evidence that the writer in fact entertained serious doubts about the substance of the remarks attributed to the public figure, or evidence that the writer knowingly enhanced the defamatory "sting," there is no

principled reason for distinguishing between liability for asserting errors of historical fact and liability for errors in attributed quotations. As the focus of libel law is on reputational injury,[2] it is utterly irrelevant whether such injury arises from the publication of defamatory quotes, paraphrases or other forms of false factual assertion. The court below correctly recognized that petitioner's narrow focus on quotation marks was a red herring and held that the traditional actual malice inquiry applies to quoted remarks of public figures.[3]

Petitioner claims that respondents' alleged departure from journalistic standards "will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment." Pet. Br. 24. While this Court has held that objective evidence of journalistic standards may in some cases be "supportive of the court's ultimate conclusion" that the actual malice standard has been met, "courts must be careful not to place too much reliance on such factors." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2686 (1989). The reason for this caution lies at the core of our First Amendment jurisprudence and this Court's recognition that

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[2] *See* Cal. Civ. Code § 45a (West 1982); W. Keeton, *Prosser and Keeton on the Law of Torts* § 111 (5th ed. 1984); Restatement (Second) of Torts § 558 (1977).

[3] Notwithstanding the *New York Times* rule's critical focus on the writer's or publisher's subjective state of mind, it has nonetheless been tempting in public figure libel cases for plaintiffs to recount the ways in which an article could have been more precise, comprehensive or balanced when opposing the defendants' summary judgment motion. *See, e.g., Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 34 (D.C. Cir. 1990) (reliance on "biased" source); *Chang* v. *Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990) (failure to confirm information with a second source); *Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 623 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988) (failure to include certain language); *Saenz* v. *Playboy Enters.*, 841 F.2d 1309, 1319 (7th Cir. 1988) (alleged failure to check facts more thoroughly). In each of these cases, summary judgment was affirmed because the subjective test had not been satisfied.

> in many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.

Time, Inc. v. *Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

In *Harte-Hanks* the Court reinforced the *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and *St. Amant* line of cases that declines to resort to journalistic standards or ethics as the defining measure of the fault standard. While ultimately concluding that the actual malice standard had been met, the Court took pains to reiterate its unqualified rejection of a professional standards rule, first tracing the rule's initial promotion by Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967):

> In place of the actual malice standard, Justice Harlan suggested that a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." This proposed standard, however, was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. Moreover, just four years later, Justice Harlan acquiesced in application of the actual malice standard in public figure cases, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 69-70 (1971) (Harlan, J., dissenting), and by the time of the Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court was apparently unanimously of this view. *Today, there is no question that public figure libel cases are controlled by the* New York Times *standard and not by the professional standards rule, which never commanded a majority of this Court.* [*Id.* at 2685 (emphasis added, citations omitted).]

Accord Tavoulareas v. *Piro*, 817 F.2d 762, 796 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987) (the court "do[es] not sit 'as some kind of journalism

review seminar offering our observations on contemporary journalism and journalists' ") (quoting *Tavoulareas* v. *Piro*, 759 F.2d 90, 145 (D.C. Cir. 1984) (Wright, J., dissenting)); *Fletcher* v. *San Jose Mercury News*, 216 Cal. App. 3d 172, 187, 264 Cal. Rptr. 699, 706 (1989), *cert. denied*, 111 S. Ct. 51 (1990).

B. The Actual Malice Standard Incorporates The Doctrine Of "Substantial Truth"

Under federal law, truth is a constitutionally mandated defense to a state defamation action. *See Garrison*, 379 U.S. at 77-78; *New York Times*, 376 U.S. at 279-80. Lower federal courts have accorded constitutional protection to "substantially truthful" publications. *See, e.g.*, *Tavoulareas* v. *Piro*, 817 F.2d at 783; *Zerangue* v. *TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987). Under California law, "substantial truth" is a complete defense to a libel action. *See Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (statement not libelous if, "although not literally true in every detail, [it] is substantially true in its implication, that is that the 'gist' or 'sting' of the article, read as a whole, is true"). Moreover, as the court below recognized, both federal and California law require a public figure plaintiff to prove that allegedly libelous statements were "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 895 F.2d at 1536 (quoting *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal. 3d 244, 256, 690 P.2d 610, 617, 208 Cal. Rptr. 137, 144 (1984)).

In both theory and practice, the "actual malice" standard and the "substantial truth" doctrine tend to merge.[4] Absent recognition of the defense of "substantial truth," the actual malice standard "would not exist for errors of interpretation . . ., for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." *Time, Inc.* v. *Pape*, 401 U.S. 279, 291 (1971). That recognition is central to the Ninth Circuit's analysis of petitioner's claims,

for it is plain that the "substantial truth" of the quotations and passages which Masson challenges (as determined from his tape-recorded comments and other evidence) was critical in convincing the court below that petitioner had failed to present evidence sufficient to create a triable issue on "actual malice" under *Anderson*, 477 U.S. at 252. Accordingly, if a statement is substantially true, in a quotation setting or otherwise, the Court need not reach the issue of actual malice. *See, e.g.*, *Anderson* v. *Cramlet*, 789 F.2d 840, 846 (10th Cir. 1986) (applying Colorado law); *see Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).

II. REPORTING ON THE WORDS OF PUBLIC FIGURES SHOULD CONTINUE TO BE SUBJECT TO THE SAME LEGAL STANDARD AS REPORTING ON THEIR DEEDS

In *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-86 (1971), the Court recognized that

> a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like.

In advancing a virtual *per se* rule for allowing juries to award damages for non-verbatim accounts of quoted words, petitioner proclaims: "Masson's words spoke for themselves—they were not just describing an underlying event, *they were the event*." Pet. Br. 34 (emphasis added). Petitioner thus makes respondents' point for them—that there is no logical basis for distinguishing liability for defamatory errors in quotation and errors of

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[4] The courts below undertook an exhaustive inquiry to determine whether the quoted statements were substantially true. *See Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539-41, 1542, 1543-44 (9th Cir. 1989); *Masson* v. *New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1407 (N.D. Cal. 1987) ("each of the alleged defamatory statements is either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations").

historical fact. The assertion is also notable in that petitioner ignores the mass of untaped information from which the articles were derived and discounts completely the daunting task of reducing the spoken to the written word.[5] A person's ability to capture in writing the exact words of a speaker depends on many objective variables: the audibility, cadence and clarity of the speaker; the hearing ability of the writer; the writer's knowledge of shorthand or other methods of abbreviation; whether the subject matter is interesting or boring to the writer; the writer's memory, concentration, educational background and vocabulary; and a host of external factors, such as visual and aural distractions.[6]

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[5] Writers and biographers have had widely divergent experience using tape recorders to assist their efforts. Many biographers find that the tape recorder complicates rather than facilitates the writer's task in sifting through the pertinent material. In recounting the research for her Pulitzer Prize-winning book, *Stilwell and the American Experience in China* (1971), Barbara Tuchman writes:

> The effort needed to write a book, even of memoirs, requires discipline and perseverance which until now imposed a certain natural selection on what survived in print. But with all sorts of people being encouraged to ramble effortlessly and endlessly into a tape-recorder, prodded daily by an acolyte of Oral History, some veins of gold and a vast mass of trivia are being preserved which would otherwise have gone to dust.

Tuchman, "Problems in Writing the Biography of General Stilwell," in *Practicing History* 65, 72 (1981). Tuchman also finds tape recorders to be incompatible with her style:

> A woman is accustomed to entering upon a conversation as a personal thing, even with a stranger—perhaps more so with a stranger—and I can't imagine myself plunking a machine down in front of someone and saying, "Now, talk."

Id. at 68. *Compare* Rosengarten, "Stepping Over Cockleburs: Conversations with Ned Cobb," in *Telling Lives: The Biographer's Art* 105, 116 (M. Pachter ed. 1979) (*"Telling Lives"*). As discussed at p. 15, *infra*, at least one study has shown that news accounts based on tape recordings contain the same kinds of errors as non-taped remarks.

[6] In his remarkable account of how reporters of congressional debate in colonial America managed to perform their craft until the publication of Thomas Lloyd's shorthand method, historian Thomas C. Leonard writes: "Since there was no clear model from the old world on how to report the discourse of a republic, these men had to develop their own approach. The craft remained personal and eclectic . . . . Until the middle of the nineteenth century reporters were self-taught, borrowing parts of other people's systems and relying on their special knack of remembering what had been said." T. Leonard, *The Power of the Press: The Birth of American Political Reporting* 69 (1986).

The Court recognized in *Pape* that "[a]ny departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." 401 U.S. at 286. These choices depend on still other variables, including time, space, talent and the writer's ethical compass. Writers of all types face such dilemmas every day, a fact which no doubt accounts for the continuing debate among writers about the permissible liberties one can take with quoted remarks. Many reject the formulaic rules of the journalism texts, not only because the aspiration cannot match the reality but because, in the view of some, it is not a sufficient aspiration. William Zinsser, an author and respected authority on nonfiction writing, has made the following observation about the writer's dual obligations to the person interviewed and the reader:

> You will find that he said much that is redundant or dull. Try to single out the quotations that are most important or colorful. You will be tempted to use all the words that are in your notes because you performed the laborious chore of getting all the words down. This is no reason for putting the reader to the same trouble. Your job is to distill the essence.
>
> What about your obligation to the person you interviewed? To what extent can you cut or juggle his words? This question vexes every writer returning from his first interview—and it should. But the answer is not hard if you keep in mind two standards: brevity and fair play.
>
> Your ethical duty to the person being interviewed is to present his position accurately. If he carefully weighed two sides of an issue and you only quote his

views of one side, making him seem to favor that position, you will misrepresent what he told you. Or you might misrepresent him by quoting him out of context, or by choosing only some flashy remark without adding the serious afterthought. You are dealing with a man's honor and reputation—and also with your own.

But after that your duty is to the reader. He deserves the smallest package. Most people meander in their conversation, filling it with irrelevant tales and trivia. Much of it is delightful, but it is still trivia. Your interview will be strong to the extent that you get the main points made without waste.

Therefore if you find on page 5 of your notes a comment which perfectly amplifies a point on page 2—a point made earlier in the interview—you will do everyone a favor if you link the two thoughts, letting the second sentence follow and illustrate the first. This may violate the truth of how the interview progressed, but you will be true to the intent of what was said. Play with the "quotes" by all means—selecting, rejecting, thinning, transposing their order, saving a good one for the end. Just make sure that the play is fair. Don't change any words or let the cutting of a sentence distort the proper context of what remains.

W. Zinsser, *On Writing Well: An Informal Guide to Writing Nonfiction* 82-83 (2d ed. 1980).

Recent empirical studies support the existence of a tolerable margin between aspiration and reality and show that Mr. Zinsser's guidance leads in most circumstances to substantially accurate quotations. In a 1989 study,[7] public meetings and speeches in Arizona were tape-recorded by the study's author, a professor of linguistics, who examined 24 resulting news articles (written by professional journalists and journalism students) for their fidelity to the tape recording. The discrepancies were coded into four categories: same meaning, similar

[7] Lehrer, *Between Quotation Marks*, 66 Journalism Quarterly 902 (Winter 1989) ("Lehrer").

meaning, different but compatible meaning and different meaning. Less than half (45.8%) of the accounts of news events and interviews produced verbatim reports. However, the sources who were quoted, when asked to review the accuracy of the articles, themselves concluded that 98.6% of the *non-verbatim* reports were substantially true and fell into the following categories:

61.7% same meaning
25.6% similar meaning
11.3% different but compatible meaning.

Sources pointed to only 2 sentences of 133 total sentences containing quotations where the departures from the tape recording resulted in different meanings.[8] Significantly, the Lehrer study also showed that "reporters . . . who used tape recorders did not produce stories of greater accuracy than those who used notes. In fact, the same kinds of errors in quotations can be found in transcriptions by those individuals who helped me transcribe tapes." Lehrer at 904. In a 1986 study of newspaper coverage of a celebrated trial in Canada (where tape recorders were prohibited), of 1,551 paragraphs with quotations from trial testimony, 883 paragraphs contained differences in quotations. The study produced 615 minor

[8] Few journalists or writers check the accuracy of quotations with the person interviewed after the fact. One writer remarked, "The interviewer is lucky if the subject does not 'improve' them as well." J. Brady, *The Craft of Interviewing* 116 (1976) ("Brady"). In one study which asked news sources whether they were quoted accurately in newspaper articles, 20% stated they were "misquoted":

> Their response is surely tempered by their perception of how the news story depicts them. If it enhances them or agrees with their self-perception, they are more likely to agree with the story's accuracy than if they are deprecated or ridiculed. This is especially true with quotations. Upon reflection, a person may wish he had not said something, or had said it differently. That wish may influence his recall.

Berry, *A Study of Accuracy in Local News Stories of Three Dailies*, 44 Journalism Quarterly 482, 484 and Table 2 (1967).

discrepancies and 417 major discrepancies (where the meaning or connotation was altered).[9]

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[9] Calamai, "Discrepancies in News Quotes from the Colin Thatcher Trial," in *Trials and Tribulations* (N. Russell ed. 1986), Table 4 (University of Regina, Saskatchewan). The former Saskatchewan Energy Minister was on trial in 1984 for the murder of his wife. Calamai found especially telling the discrepancies in news accounts of a key witness's most "popular" quote, in which she recounted Mr. Thatcher as saying (according to the official transcript): "I have to admit it is a strange feeling to have blown your wife away." The newspaper accounts of this quotation included the following permutations:

"a strange thing to blow your wife away"
"a strange feeling blowing your wife away"
"a strange feeling to blow your wife away."

According to Calamai, "[o]bviously, none of these discrepancies changed the meaning or connotation of the quotation."

Judges, lawyers and witnesses have long recognized that even the most conscientious court reporters cannot produce error-free transcripts. *See, e.g., United States v. Perkins*, 498 F.2d 1054, 1058 & n.4 (D.C. Cir. 1974); Fed. R. App. P. 10(e); Walker, "Language at Work in the Law," in *Language in the Judicial Process* 203, 212-13 (J. Levi & A. Walker eds. 1990).

Even when a transcript is available prior to publication, and where one word can make a critical difference in the defamatory "sting" of the statement, human beings are fallible. During the intense media coverage of the Watergate affair, a misplaced homonym produced considerable confusion and consternation arising from statements by President Nixon at a press conference on September 5, 1972. The President was asked whether he had listened to certain tapes of Oval Office conversations. The White House transcript quoted President Nixon as saying in response:

> "As a matter of fact, the only time I listened to the tapes, *to certain tapes*—and I didn't listen to all of them, of course —was on June 4th [italics added]."

The *New York Times* transcript of the press conference provided the following account:

> "As a matter of fact, the only time I listened to the tapes, *two certain tapes*—and I didn't listen to all of them, of course —was on June 4th [italics added]."

Lewis, "Some Errors and Puzzles in Watergate Coverage," *Columbia Journalism Review*, Nov./Dec. 1973 at 28.

A series of articles in major newspapers and weekly magazines drew various inferences from the President's statement. Time magazine, for example, suggested that the President's claim that the Oval Office tapes were compatible with his innocence was "puzzling" as he had listened to only two of the pertinent tapes. *See id.* at 28-29. It was not until presidential press secretary Ron Ziegler issued a statement a week later that the matter was clarified.

A recent example of news reporting on a high profile federal court case further illustrates the point. On November 21, 1990, Michael R. Milken, the former head of "junk bond" operations at Drexel Burnham Lambert, Inc., was sentenced in a Manhattan federal court. An unofficial court transcript of the sentencing proceedings (the only one available) set forth the following excerpt from the sentencing judge's comments:

> When a man of your power in the financial world at the head of the most important department of one of the most important investment banking houses in this country repeatedly conspires to violate and violates securities and tax laws in order to achieve more power and wealth for himself and his *wealthy* clients and commits *financial crimes that are particularly hard to detect, a significant prison term is required in order to deter others.*[10]

The front-page story of *The New York Times* the next day contained the following quotation:

> "When a man of your power in the financial world, at the head of the most important department of one of the most important investment banking houses in this country, repeatedly conspires to violate and violates securities laws and tax laws in order to achieve more power and wealth for himself and his [*wealthy*] clients, and commits *financial crimes that are particularly hard to detect, a significant prison sentence is called for,*" Judge Wood said.[11]

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[10] Transcript (Unofficial) of Sentencing of Michael R. Milken, *United States* v. *Milken*, (S) 89 Cr. 41 (KMW), Nov. 21, 1990, *reprinted in* Sec. Insider Trading Litigation Rep. (Andrews) at 7657 (Dec. 5, 1990) (emphasis added).

[11] *Milken Gets 10 Years for Wall St. Crimes*, N.Y. Times, Nov. 22, 1990, at A1, col. 6 (emphasis added).

The lead editorial in *The Wall Street Journal* on November 23, 1990 stated:

> Crimes that are "harder to detect warrant greater punishment to deter others," she said.[12]

The *Journal*'s news story, which ran the same day, set forth a fuller quotation from the court transcript:

> "You [also] committed crimes that are hard to detect, and crimes that are hard to detect warrant greater punishment in order to be effective in deterring others from committing them."[13]

The foregoing examples suffice to illustrate that "memory for meaning is better than memory for verbatim prose."[14] They also illustrate the following humble truths: memory is imperfect; some people have better memories than others; people speak faster than they can write; tape recorders and video cameras are not always available, acceptable to interviewees, legally permissible, in good working order, or conducive to eliciting candid information in the first place; and the daily newspaper, the weekly magazine, the evening newscast, the literary profile and the broad spectrum of biographical works represent different genres, each of which routinely employs quotations, sometimes using different standards in so doing. The result is that honest, conscientious reporters, authors and biographers, who cannot possibly report all words of public figures in the exact sequence originally spoken, and in full text, do the best they can to capture accounts of their exact words, or at least their rational rendering of the words spoken, trying their best to preserve the context and meaning.[15]

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[12] *Symbol of the 90's*, Wall St. J., Nov. 23, 1990, at A8, col. 1.

[13] *Milken's Stiff 10-Year Sentence Is Filled With Incentives to Cooperate With U.S.*, Wall St. J., Nov. 23, 1990, at A3, col. 3; *see also* Brady at 206.

[14] Lehrer, *Remembering and Representing Prose: Quoted Speech as a Data Source*, 12 Discourse Processes 105, 121 (1989).

[15] Historians and biographers who write about or quote living people confront the same range of options for capturing, recording and editing the remarks of public figures and share a corresponding legal risk. "A biographer works in mosaic, translating fragments of life into a sequence of words: a highly responsible task with an unwritten ethic of its own." L. Edel, *Writing Lives* 109 (1984).

It is, of course, not surprising that some academics and working journalists exhort writers to use quotations only when the words are "verbatim." Others counsel editing and rewriting which still remains faithful to the speaker's meaning.[16] *Amici* respectfully suggest that while the latitude journalists, biographers or other writers may knowingly take with spoken words is an important subject for continuing debate within the writing professions, "press responsibility is not mandated by the Constitution." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974). Even if it were, the largely unexamined axiom that it is possible for two human beings to produce the identical quotation is dubious, as the above-cited studies demonstrate.

With certain exceptions not relevant to the present discussion,[17] the dissent below would invite a jury determination on the malice question whenever a person interviewed challenges a writer's or author's recollection of his or her words. If that were the law, a jury trial would ensue each time a reporter, author or biographer,

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[16] *See, e.g.*, Weaver, Hopkins, Billings & Cole, *Quotes vs. Paraphrases in Writing: Does it Make a Difference to Readers?*, 51 Journalism Quarterly 400 (Fall 1974) ("Many professionals argue for changing direct quotes slightly, perhaps correcting improper grammar and omitting redundancies and doing other condensing—still enclosing the remarks within quotation marks. That argument boils down to giving the gist of the speaker's remarks with no change in meaning, yet doing so in a succinct and readable manner.").

[17] The dissent would remove from the suspect categories inaudible words, words spoken in a foreign language, editing to improve grammar or to avoid embarrassment to the speaker, and passages signaled as being non-verbatim. 895 F.2d at 1558, 1563, 1564 (Kozinski, J., dissenting).

Petitioner would carve out paraphrases, misperceptions, minor changes to correct for grammar or syntax, publications which alert readers that conversations have been fictionalized, and inartful translations. Pet. Br. 18, 36-37.

in good conscience, scribbling as quickly as he or she can, produces deviations from the "verbatim" remarks of public officials or public figures who later claim they are defamed by the words attributed to them.

Further, liability for a writer's non-verbatim attribution of allegedly defamatory quotations to public officials or public figures should not depend on the myriad methodological, technological and editorial choices which writers and editors make every day. Were the standard to rest on these practical variables, the "quantum and quality" [18] of the evidence of actual malice weighed by the trial court might depend, for example, on whether a tape recorder was used for some portions of an interview but not others. Reporters and writers would then act at their peril in publishing untaped portions of interviews for fear that a jury might, as petitioner and the dissent below urge,[19] be allowed to infer actual malice from the mere failure to use taped portions. Liability could also turn on whether the interviewee believed that only taped remarks would be used, whether an audiotape or videotape was legally permissible, whether the publisher is in the print or broadcast medium, or whether the interview was conducted in person or on the telephone.[20] Even

[18] *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

[19] *See* 895 F.2d at 1552 n.6 ("While Malcolm tape-recorded most of what Masson said, she now claims that some of Masson's most damaging statements—including his use of the term intellectual gigolo—were made during a conversation that was not recorded. Masson claims that he never made such a statement. *The jury might infer from the absence of a tape recording that Malcolm fabricated the remark.*") (emphasis added) (Kozinski, J., dissenting). This is, indeed, the crux of petitioner's argument. "This was also not a question of misperception or faulty notes. Since Malcolm attended the interviews *and had possession of the tapes*, she necessarily knew that the quotes she was attributing to Masson were false . . . ." Pet. Br. 26 (emphasis added).

[20] A telephone interview has definite disadvantages, as the whole range of communicative body language and facial expression is absent. A wire service reporter in the 1960's mistakenly reported that civil rights leader James Meredith was "shot dead," when the

when there is no tape recording, petitioner argues that a public figure's mere denial is sufficient to create a jury issue on the malice question. Pet. Br. 43. Writers also might be forced to retain every scrap of paper and notation from interviews lest the destruction of their handwritten notes, coupled with an interviewee's subsequent denial, produce a jury issue.[21] None of these methodological choices sheds any light on the publisher's subjective awareness of the probable falsity of published quotes and none is, therefore, constitutionally sufficient evidence of actual malice under *New York Times* and its progeny.

III. NON-VERBATIM DEPARTURES FROM QUOTED REMARKS WHICH ARE THE PRODUCT OF RATIONAL EDITORIAL JUDGMENTS OR DO NOT CAUSE REPUTATIONAL HARM CANNOT ALONE ESTABLISH ACTUAL MALICE

Unlike the record on the malice issue available in *Harte-Hanks* v. *Connaughton*, 109 S. Ct. 2678, 2697-98 (1989), where critical interviews of a grand jury witness and the plaintiff "were captured on tape, [and] there [could] be no dispute as to what was communicated, nor how it was said," here, petitioner elected to sue for damages for the publication of a few statements which were not recorded on tape in the exact words published by respondents. Petitioner acknowledged that he knew that some of his interviews and conversations with respondent Malcolm were not tape recorded. J.A. 237-39.

reporter was actually told on the telephone that he was "shot in the head." *See* Brady at 174, 181.

[21] The dissent below implies that such accumulation should be the rule. 895 F.2d at 1552-53 n.7. *But see Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 33-35 (D.C. Cir. 1990) (affirming summary judgment notwithstanding plaintiff's claim that reporter's inability to reconstruct his notes was evidence of actual malice); *Chang* v. *Michiana Telecasting Corp.*, 900 F.2d 1085, 1090-91 (7th Cir. 1990) (reporter's inability to produce notes does not permit inference of actual malice).

A. Respondents' Editorial Judgments Produced A Rational Interpretation Of Ambiguous Remarks

In *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), the Court reviewed a court of appeals decision which rested on the premise that a magazine's deletion of the word "alleged" from its published account of the findings of a 1961 Civil Rights Commission report on the subject of police brutality was sufficient to sustain a jury finding of actual malice. The Court held:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact. [*Id.* at 290.] [22]

Pape was the anchor of this Court's decision in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). In *Bose*, the critical statement in Consumer Reports magazine about a loudspeaker system was that "individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander *about the room*." *Id.* at 488 (emphasis added). The evidence proffered by the plaintiff on the malice issue was a Consumers Union engineer's written report stating that the "[i]nstruments . . . appeared to suffer

[22] The author of the article testified at trial that the "full context of the Justice report" of the Monroe incident indicated to him that the incident had occurred as described, and he denied, therefore, having falsified the report. A Time researcher testified that after consulting several articles describing Monroe's claims about the raid and other articles decribing Pape's career, she believed the article was "true" as written. *Id.* at 283.

from giganticism and a tendency to wander *around the room*." *Id.* at 494 (emphasis added). At trial, the engineer testified that his actual perception of the movement of the sound source at the time of testing was "along the wall" rather than "about the room." Based on these discrepancies, the trial court determined that there must have been malice in light of the engineer's understanding and the words he actually used, entering a verdict in favor of the plaintiff.

The court of appeals reversed, 692 F.2d 189 (1st Cir. 1982), and this Court affirmed. Notably, the Court refused to equate the engineer's "misconception" with the demanding actual malice standard:

> "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves*." *Time, Inc.* v. *Pape*, 401 U.S., at 285. See generally *The Santissima Trinidad*, 7 Wheat. 283, 338-339 (1822). Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. *Time, Inc.* v. *Pape*, *supra*, at 290. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.

466 U.S. at 512-13 (emphasis in original).

As in *Pape*, respondents here published an account of complex academic and personal subjects based on a substantial volume of material. Instead of interpreting a complex document, however, respondents published an account of petitioner's words, based on 40-50 hours of tape-recorded interviews, and notes and recollections of many unrecorded interviews, all of which formed a body of "external evidence of [Masson's] overall meaning." *Pape*, 401 U.S. at 290. Like the respondent in *Bose*, respondent Malcolm published her understanding or conception of what Masson said in a few quoted passages which were neither recorded on tape in the exact words published, nor witnessed by others.

Accordingly, for petitioner to prevail with respect to the statements he claims were distorted, he must demonstrate the following by clear and convincing evidence. First, petitioner must show that the meanings of his actual statements were so materially altered that the published account was neither a rational interpretation nor a substantially correct recitation of his views. If such distortion occurred, petitioner must then show either that respondents were aware that the editing produced this result or that they acted with reckless disregard in not being so aware. The Ninth Circuit held that actual malice would not be found when "quotations are either 'rational interpretations' of ambiguous remarks made by the public figure, or do not 'alter the substantive content' of unambiguous remarks actually made by the public figure." 895 F.2d at 1539 (citations omitted). A quotation that rationally interprets an ambiguous remark or does not alter the substantive content of an unambiguous remark cannot be "false" for the unremarkable proposition that the author has not changed the meaning of what he or she believed the declarant said. (See Part IB, *supra.*) Thus, if a published quotation meets the court of appeals' criteria, a plaintiff cannot prove malice by clear and convincing evidence because it is impossible to show that the defendant in fact "entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).

By focusing on these questions, the court of appeals' analysis is wholly consistent with this Court's oft-stated rule (summarized at pp. 5-10, *supra*) that the actual malice standard requires a determination of each defendant's subjective attitude toward the truth or falsity of a publication. *See Harte-Hanks*, 109 S. Ct. at 2696; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974); *St. Amant*, 390 U.S. at 731.

In two of the offending statements, petitioner claims that Malcolm editorially distorted the sense of his statements in a fashion that defamed him. In one statement, he claims Malcolm appended a quotation from a different

conversation to the end of a discussion which Masson claims was not related to it, allegedly causing him to appear as if he were taking credit for a discovery that was not his. In the second statement, Malcolm "remov[ed]" an intervening passage, Pet. Br. 34, shortening the quotation and, according to Masson, completely changing the sense of his statement.

Masson's central contention is no different than the contention of many persons dissatisfied with the manner in which their statements are editorially presented.[23] He advances the novel proposition, however, that virtually any departure from "a full direct quotation" should be sufficient to sustain a jury verdict of actual malice. Pet. Br. 33. That remarkable departure from prevailing doctrine would create a jury issue, even in public figure cases, every time a reporter rationally interprets an ambiguous remark, or reduces a long interview on complex subjects, in a manner with which the speaker disagrees or by attributing quotations that the plaintiff denies making. Indeed, that possibility is the very one protected against in *Pape*, where the Court acknowledged that reporting on the words of public figures "presents rather complicated problems" and will entail "an almost infinite variety of shadings." 401 U.S. at 286. To allow liability to accrue to writers and publishers for what may at most be a "misconception" arising from an interviewee's awkward, ambiguous or confusing construction of the world of subjects reported in the media and other works of nonfiction "would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact." *Id.* at 290.

It is undeniable that editorial decisions to "thin" quotes, or transpose or rearrange their order, is a process that occurs every day in every newspaper, television and radio station in America, as well as in various works of non-

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[23] *See, e.g., Tavoulareas* v. *Piro*, 817 F.2d 762, 769-71 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987); *Vachet* v. *Central Newspapers*, 816 F.2d 313, 316-17 (7th Cir. 1987); *Anderson* v. *Cramlet*, 789 F.2d 840, 844-45 (10th Cir. 1986).

fiction writers.[24] To create a jury issue in public figure libel for editorial judgments made daily in the sometimes hurried exercise of publishing a newspaper or magazine, or airing a television or radio broadcast, would produce a rule wholly at odds with the First Amendment's guarantee of "breathing space," *New York Times*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), for "a vigorous and uninhibited press." *Gertz*, 418 U.S. at 342. Indeed, such a rule could effectively preclude summary judgment in libel suits based on assertedly defamatory quotations. *See* note 26, *infra*. The Ninth Circuit's consideration of the alleged editorial distortions by respondents measured the ambiguity, confusion and volume of the actual statements and weighed whether respondents' account, as supported by Malcolm's declarations (J.A. 46-61, 82-86), was rational.[25] In so doing, it concluded that respondents did not in fact entertain a "subjective awareness of probable falsity" in making their editorial judgments. Without more, the court correctly held that petitioner's evidence fell short of the demanding *Anderson* standard. 895 F.2d at 1542.

B. Non-Verbatim Departures Which Do Not Increase The Defamatory Impact Or Alter Substantive Content Cause No Reputational Injury

The remaining statements challenged by Masson are, he contends, wholly "fabricated" as they do not appear on transcripts of his tape-recorded interviews. Pet. Br.

[24] According to Leon Edel, "a biographer is a storyteller who may not invent his facts but who is allowed to imagine his form. He is like the sculptor who doesn't invent his clay, or the painter who doesn't invent the tubes out of which he squeezes his paint. The biographical imagination is exercised upon gathered data; and the squeezed colors may not be mixed or blended. They can only be arranged." Edel, "The Figure Under the Carpet," in *Telling Lives* 17, 20 (1979).

[25] Petitioner seeks to avoid the force of *Pape* by ignoring the considerable volume of his undisputed statements, then limply stating, "since [Malcolm] had tape recordings there was no ambiguity as to the actual words used, and she faced no choices in quoting Masson verbatim." Pet. Br. 33.

20-21. Petitioner claims that the quotations are "false," "fake," "calculated falsehood[s]," and "fabricated," and that this is a case about the "right to fake quotes." Pet. Br. 22-31.

Masson's claims are thus founded on his categorical denial that he said the words attributed to him, and his conclusion that, accordingly, respondents must have been aware of their "falsity." Petitioner ignores the critical distinction between "false" quotations (which are "false" merely because he claims not to have said them, but otherwise contain his views) and quotations that do not substantially reflect his statements and opinions as derivable from other evidence.

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), the Court made plain that "[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*." Petitioner's refrain that an allegedly invented or deliberately altered quote is *per se* proof of knowledge of falsity is an attempt to evade scrutiny of what Malcolm undisputedly knew—the precise words Masson uttered to her as captured by the tape recorder or in notes or memory. And it is her knowledge and state of mind that are the touchstones of the "actual malice" analysis.

Applying the *Anderson* standard, the court below reviewed a lengthy collection of transcripts of Masson's own comments, which related to the same subjects as the challenged quotations. Based upon that review—of a quantity of evidence far greater and more supportive of the published work than is typically the case in public figure libel actions—the court correctly concluded that neither the quantum nor the quality of Masson's evidence was sufficient "to allow a rational finder of fact to find actual malice by clear and convincing evidence." 477 U.S. at 254.[26]

[26] The courts below declined to consider Malcolm's typewritten notes which were offered, together with her declarations (J.A.

The facts reviewed by the court were far from the extreme case where the challenged quotations were concededly invented by the reporter from whole cloth without ever having spoken to the person quoted, as in *Carson* v. *Allied News Co.*, 529 F.2d 206, 212-13 (7th Cir. 1976), or *Selleck* v. *Globe International, Inc.*, 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838, 844 (1985).[27] The facts in *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), are closer. The Eng-

46-61, 82-86), as negating malice as to three of the challenged statements (J.A. 52-53, 59, 112-15, 127, 135-36). We believe the courts below could have, and this Court should, consider those notes on this issue because nothing Masson has offered to challenge the notes contradicts the content of the notes as an accurate reflection of *what Malcolm heard Masson say* on those three occasions.

At the summary judgment stage, a reporter's notes are often critical evidence negating malice, and the public figure plaintiff's effort to discount notes has been rejected. *See, e.g., Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990) (reporter's claim that he accurately reported what a source told him was unrebutted notwithstanding deposition testimony showing he could not reconstruct from his notes precisely the phrases used by the source); *Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 625-26 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988) (relying on reporter's notes to negate malice in the face of a recorded conversation in which source made a contradictory statement); *cf. Tavoulareas*, 817 F.2d at 789 ("actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith").

[27] By the same token, they also differ significantly from those in *Bindrim* v. *Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), where there was a marked disparity between profane quotations attributed to the plaintiff and the utterances actually made on tape. The defendant in *Bindrim* was aware there was a meaningful discrepancy between the published quotations describing the event and the tape recording documenting it because she attended the tape recorded session and thus *knew* that her "portrayal of what actually happened" was false. 155 Cal. Rptr. at 35. In the present case, rather than disproving the accuracy of the attributed quotations, the tape recordings serve to *support* respondents' other evidence that Masson made remarks that were substantially similar to the ones he now disputes.

lish-language publisher toned down harsh criticisms of the plaintiff that appeared in the original Spanish version and that were attributed to Ernest Hemingway. Acknowledging that the publisher knowingly

> transform[ed] Hemingway's words to the much milder "I don't trust him," [the publisher] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement . . . .

551 F.2d at 914. Such "fictionaliz[ation]" when the change "did not increase the defamatory impact or alter the substantive content" does not affect the central consideration in public figure libel—the vindication of reputational injury.[28] The same analysis was appropriately applied by the courts below in determining that "the substantive content" of Masson's acknowledged statements was reproduced in the quotations he disputed, and in therefore finding that respondents did not have knowledge of falsity or reckless disregard for truth in publishing the statements. *Cf. Ryan* v. *Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

The test for actual malice in the quotation context, applied by the court below, is consistent with this Court's prior decisions regarding the "breathing room" necessary to accommodate First Amendment concerns. Under certain circumstances, the First Amendment protects even false publications so long as the defendant publishes with a good faith belief that the report is true. *See Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776 (1986). First Amendment protection must, accordingly, extend to publications that accurately reflect the substance of a communication so long as plaintiff cannot show by clear and convincing evidence either that the defendants believed they were disseminating a defamatory falsehood, or had a high degree of awareness of the statement's probable falsity. *See New York Times*, 376 U.S. at 279-80; *Garrison*, 379 U.S. at 74; *St. Amant*, 390 U.S. at 731-

[28] *See* note 2, *supra*; *Masson*, 895 F.2d at 1536.

32. To hold otherwise would undermine the delicate balance between First Amendment freedoms and private sensibilities established by *New York Times* and its progeny.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

Of Counsel:

HARRY M. JOHNSTON, III
The Time Inc. Magazine Company
Time & Life Building, 17th Floor
Rockefeller Center
New York, New York 10020

RICHARD M. SCHMIDT, JR.
N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
Attorneys for The American Society of Newspaper Editors

CHARLES S. SIMS
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
Attorneys for The American Civil Liberties Union

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

ROSLYN A. MAZER
(Counsel of Record)
PAUL R. TASKIER
MELINDA C. BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

LEE LEVINE
JAMES E. GROSSBERG
ROSS, DIXON & MASBACK
555 - 13th Street, N.W.
Suite 1300E
Washington, D.C. 20004
Attorneys for The Newsletter Association

MARK GOODMAN
Student Press Law Center
1735 Eye Street, N.W.
Suite 504
Washington, D.C. 20006

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APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Life*, *Money*, *People*, and *Sports Illustrated*.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 people who hold positions as directing editors of daily newspapers throughout the United States.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade association that serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to disseminate information freely concerning matters of public interest.

The Authors Guild, Inc. is the major national society of professional authors, representing more than 6,500 members throughout the nation. One of the Guild's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression. Members of the Authors Guild include not only journalists, but also biographers and historians who regularly report the words of public figures.

The Point Reyes (California) *Light* is a weekly paper with 3,800 circulation which won the Pulitzer Prize in 1979 for its coverage of the Synanon Foundation Church. *The Light* has been sued for in excess of $1 billion in six libel suits arising from its coverage of Synanon; none of these suits was successful. (*See Reader's Digest Ass'n* v. *Superior Court*, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984), *cert. denied*, 478 U.S. 1009 (1986), and *Mitchell* v. *Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).)

College Media Advisers, Inc. is a national, nonprofit organization representing more than 600 student media professionals at more than 300 colleges and universities across the country, including public, private, two-year and four-year universities.

Student Press Law Center is a national, nonprofit, incorporated, legal research, information and advocacy organization formed for the purposes of promoting and preserving the free press rights of high school and college journalists and encouraging quality student journalism.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 270,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all Americans. The core of the ACLU's concern is the First Amendment guarantee of freedom of speech and of the press.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. The Newsletter Association has a longstanding commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

Edmund Morris is the author of *The Rise of Theodore Roosevelt* (1979), for which he was awarded the Pulitzer Prize for Biography and the National Book Award in 1980. He is currently at work on a sequel, *Theodore Rex*. He is the authorized biographer of President Ronald Reagan.

David McCullough is the author of *The Johnstown Flood* (1968), *The Great Bridge* (1972), *The Path Between the Seas* (1977), for which he was awarded the National Book Award for History in 1978, and *Mornings on Horseback* (1981), for which he was awarded a second National Book Award, this one for Biography, in 1982. Each of these books involved extensive interviewing. He is currently working on a biography of Harry S. Truman.